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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PULLMAN STANDARD, INCORPORATED
Petitioner,
v.
LOUIS PINKARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below, disregard the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., exceed its appellate authority and, in the words of the dissenting Judge, engage in "precisely the historical practice of the former Fifth Circuit condemned by the Supreme Court in *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (App. 59a-60a)"?

2. Did the Court below apply a reverse discrimination standard, by weighing respondent's militance as a mitigating factor against his misconduct in deciding whether petitioner's motivation for firing him was lawful, so as to place him in a better position as a result of his militance than he would have occupied as a non-militant committing the same misconduct?

3. Did the Court below err in concluding that an action for retaliation can be brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981?

PARTIES[1]

Information under Rule 28.1: Pullman Standard, Inc., petitioner herein, is presently a separate corporation and a subsidiary of Pullman Transportation Company Inc. Formerly it was a division of Pullman, Inc., known as Pullman-Standard as was so designated in the proceedings below.

[1] The parties in the Court below were: Louis Pinkard, Edward Lofton, Richard Holston, Donnie Sealie, plaintiffs-appellants; and Pullman-Standard, a division of Pullman, Incorporated, defendant-appellee and petitioner here. As a result of several corporate changes it is now a separate corporation known as Pullman Standard, Incorporated.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 10, 1982. Petitioner timely filed and served an application for rehearing and suggestion of rehearing en banc in said Court, and the same was denied without opinion by order entered August 31, 1982.

OPINIONS BELOW

The opinions below are reported as follows: (1) Opinion of the United States District Court for the Northern District of Alabama on October 31, 1978, reported at 80 F.R.D. 287, and 18 FEP Cases 723, (App. 1a); (2) Opinion of said District Court on June 29, 1979, (App. 5a); and (3) Opinion of the United States Court of Appeals for the Fifth Circuit Unit B, now the Eleventh Circuit dated June 10, 1982, reported at 678 F.2d 1211, 29 FEP Cases 216, and 29 EPD ¶ 32,862 (App. 53a).

Copies of these opinions are appended to this petition at the indicated page numbers.

JURISDICTION

The judgment sought to be reviewed was dated and entered on June 10, 1982. Petitioner timely applied for rehearing of said judgment and its application was denied by order dated and entered August 31, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The only statute involved in the questions presented for review is the Civil Rights Act of 1866, 42 U.S.C. § 1981, which is set forth in its entirety in Appendix D, infra, App. 91a. Rule 52(a), Federal Rules of Civil Procedure, is however, of paramount importance herein.

STATEMENT OF THE CASE

This is the case in which the Eleventh Circuit, the ink hardly dried on *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), returned to its historical practice of finding the facts de novo, condemned in *Swint*, and required not equal, but preferential, treatment of activists. A detailed factual statement is perhaps unneccessary since the findings of both triers of fact (arbitrator and District Court) are in the appendix at 37a-50a and 5a-36a respectively. Either one is adequate and reference to either would be approximately equivalent to reading the remainder of this Statement of the Case, with the added observation that the Eleventh Circuit simply found the facts of Mr. Pinkard's case *de novo* without having heard the evidence.

Respondent Mr. Pinkard was discharged on February 12, 1976 and filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) the next day, along with a charge by Mr. Edward Lofton, who had been discharged December 23, 1975 (App. 7a, 12a). Without waiting

for 180 days, conciliation, or a notice of right to sue Pinkard and Lofton commenced this suit on February 17, 1976 claiming jurisdiction under Title VII, 42 USC § 2000e, et seq. (App. 6a). Subsequently Richard Holston and Donnie Sealie were added as plaintiffs and claims by Pinkard and Lofton under § 1981 were added by amendment (App. 6a). On July 26, 1976 three grievances, all over Pinkard's discharge, were submitted to arbitration under the Steelworkers Union contract, and on October 15, 1976, Arbitrator James P. Whyte rendered his award denying the grievances and sustaining the discharge as being for just cause. (App. 16a, 37a) On October 12, 1978 the trial court conducted a Rule 23 hearing following which it found the claims of the plaintiffs were not typical of those of any class, and on October 31, 1978 ordered that the action not be maintained as a class action (80 FRD 287, 18 FEP Cases 723, App. 1a). The merits of the individual claims of the four plaintiffs, all discharged employees, came on to be heard on December 4, 1978, the bench trial lasting four days. On June 29, 1979 the trial court made findings of fact and conclusions of law and entered judgment for Pullman-Standard on all claims. (App. 5a).[2]

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[2] As to Pinkard's and Lofton's Title VII claims the District Court concluded it lacked subject matter jurisdiction because it was not alleged that the EEOC had issued either a notice of failure of conciliation (or so-called right to sue letter) and although such notices were eventually issued on August 18, 1978, 30 months after this action was commenced, they were issued contrary to EEOC published rules, 29 CFR §§ 1601.19 and 1601.28, and were therefore invalid under the Administrative Procedure Act, 5 U.S.C. §§ 552(a)(1) and 555(c). It denied these claims for lack of pleading or proof of valid right to sue letters. (App. 6a-8a).

As to all other claims of Lofton, and the claims of Holston and Sealie, the trial court found that they failed to establish a prima facie case of discrimination; that defendant articulated legitimate reasons for firing each of them (respectively: distributing a handbill advocating a slowdown in breach of the union contract (App. 13a-15a); failure

As to the § 1981 claims of Pinkard, the District Court found after the four-day trial that he also failed to establish a prima facie case of discrimination (App. 19a-20a) in that no disparity in treatment was established (App. 19a). Petitioner articulated as its reasons for firing Pinkard "acts of insubordination to Track Foreman Dave Mason" and abuse of the grievance procedure after warnings (App. 16a). The District Court found as a fact that Pinkard "was insubordinate, that his insubordination was egregious, and that management thereby had a legitimate reason to terminate him" (App. 19a); that "no prima facie showing of discrimination could be found, because no disparity in treatment was established." (App. 19a) More particularly, it found that the insubordination it referred to consisted of two elements: One, he called his foreman, Dave Mason, who was black, a liar, without justification, in the presence of another employee (App. 17a-18a); and two, he loudly refused to go to a meeting with management which Mason told him to attend (App. 17a-18a). The District Court also found he abused the union contract grievance procedure by persistently going outside its channels, which the petitioner tolerated up to a point, but had often warned him to cease; and that the incident leading up to his calling Mason a liar and refusing to meet with management was a typical example of Pinkard's disruptive behavior of resorting to extra-contractual means of handling employee grievances (App. 19a). The District Court's opinion herein further found (App. 20a-21a) that Pinkard's conduct as a union officer subsequent to his discharge, of unlawfully interfering with rights of Pullman-Standard employees to freedom of speech under the LMRDA, 29 USCA § 411(a)(2), dis-

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to follow direct orders of the foreman and his overall record (App. 8a-10a); and refusal to perform as instructed and his overall record (App. 10a-11a)); and there was no proof of pretext.

qualified him in any event from reinstatement and back pay and constituted unclean hands.[3]

The plaintiffs duly appealed the judgment of the District Court to the United States Court of Appeals below, which on June 10, 1982 rendered a fragmented decision affirming it in part, and reversing it in part, but with respect only to the § 1981 claim of Pinkard based on retaliation. The panel majority consisting of Judges Kravitch and Clark made an independent determination of the facts, rejected the District Court's findings that no prima facie case of discrimination had been shown; that no disparity in treatment had been shown; and that management had a legitimate reason to terminate Pinkard; it substituted its own contrary and independent findings;[4] and reversed the judgment "and remand[ed] the case for a determination of damages [sic]." (App. 87a).

The dissenting Judge, Lynne, said (App. 87a-89a):

> "While the court correctly states the controlling clearly erroneous standard of Rule 52(a), F.R.C.P., its conclusion that Pinkard's discharge was motivated in part by his lawful advocacy of minority rights is the product of the court's improper independent consideration of the totality of the circumstances found in the record. That is precisely the historical practice of the former Fifth Circuit condemned by the Supreme Court in *Pullman-Standard* v.

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[3] The other District Court case to which Judge Guin referred was later affirmed on appeal. *Parker* v. *Local No. 1466, United Steelworkers of America, Leonard Lewis, Louis Pinkard and Arvil L. Hulsey*, 642 F.2d 104 (5th Cir., 1981), rehearing denied 646 F.2d 567 (5th Cir., 1981).

[4] The arbitrator who denied Pinkard's discharge grievance and the District Court both held discharge was an appropriate disciplinary penalty. They heard oral evidence. Being joined in their views by Judge Lynne, three out of five who have considered the question have been of the opinion that discharge was not an excessive penalty for the misconduct. Only two have thought it was.

Swint, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

"Acknowledging tangentially that independent review of the record reveals that Pinkard was insubordinate, the Court demurs to the severity of the sanction of discharge as though insubordination may easily be quantified. It therefore proceeds to resolve conflicts in the record evidence, to draw its own inference and to make credibility choices . . . .

"In concluding that the District Court's finding that the company discharged Pinkard because of his insubordination was clearly erroneous in that it was 'against the clear weight of the evidence' . . . the court oversteps the bounds of appellate authority.

* * *

"To put the matter bluntly, the Court has substituted its own finding of ultimate fact for that of the District Court by rehearsing subsidiary facts to suit its purpose without a critical examination of the abundant record evidence which undercuts its conclusion."

The opinion of the Court of Appeals is actually split three ways. It began on a note of unanimity (App. 54a):

"Most of the issues presented provoke no dissent among us. We are in agreement that the district court properly denied class certification. In addition, we agree that the judgment is to be affirmed as to plaintiffs Holston and Sealie. We also agree that the judgment is to be affirmed as to the § 1981 claims of racially-based discharge made by plaintiffs Pinkard and Lofton.

". . . Furthermore, all agree that the judgment is to be affirmed as to Lofton's claim of retaliatory discharge."

Thus, it was unanimously agreed that Holston and Sealie could properly be discharged for insubordination, and that Pinkard's discharge for insubordination was not *racial* discrimination. (However, as we shall see, what was deemed enough to discharge Pinkard as a black was deemed not enough to fire him as a militant).

At this point, the three judges went three divergent ways. The remaining claims were: Lofton's claim for racial discrimination under Title VII, Pinkard's claim for racial discrimination under Title VII, Pinkard's claim for retaliation under Title VII, and Pinkard's claim for retaliation under § 1981. The judges voted as follows:

	Jurisdiction	Merits	Result
Lofton's T.VII race claim	Kravitch & Lynne, JJ. held present: Clark, J., dissented, would find no jurisdiction (App. 66a-73a)	All Concurred, Lofton failed to prove prima facie case of discrimination	Affirmed
Pinkard's T.VII race claim	Ditto	Kravitch & Lynne, JJ. found against Pinkard (App. 55a)	Affirmed
Pinkard's T.VII Claim of retaliation for lawful advocacy	Ditto	Kravitch would find for Pinkard (App. 45a) Lynne against him (App. 87a-89a)	Affirmed
Pinkard's § 1981 claim of retaliation for lawful advocacy	All concurred that jurisdiction was present	Kravitch & Clark, JJ. found for Pinkard; Lynne, J., dissented. (App. 54a)	Reversed and remanded for a determination of damages (App. 87a)

The only questions presented on this petition relate to the Court of Appeals' reversal as to Pinkard's § 1981 claim of retaliation for lawful advocacy. However, we have discussed the disposition of the other eleven claims because there is at least an apparent inconsistency in reversing as to Pinkard's § 1981 retaliation claim while finding that the same insubordination justified his discharge so far as his § 1981 racial claim was concerned; and that insubordination likewise justified the discharges of Holston and Sealie. This inconsistency we submit, is an important clue to the majority's way of erroneously according preferential treatment to militants over non-militants in its fact-finding process.

In order to justify its assumption of the role of independent fact finder as to Pinkard's § 1981 retaliation claim, the majority had to contend with the *Swint* case, supra. Over Judge Lynne's vigorous dissent, the majority asserted that *Swint* was distinguishable, as follows (App. 87a):

> "Nothing in the recent opinion of *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), affects this case. There the Court found that our court had erred in (1) resolving in the first instance a factual dispute which had not been considered by the district court and (2) failing to remand where findings are infirm because of an erroneous view of the law and the record permits two or more resolutions of the factual issue."

Having cleared *Swint* out of the way, the majority said the District Court's finding that no disparity of treatment of Pinkard had been shown, was clearly erroneous, and it proceeded to find the facts as follows:

> "As mentioned, other similar incidents have been met by the employer with reprimands, and never with discharge." (App. 85a)

But the only possible "mention" referred to here was the following portion of the Court of Appeals' majority opinion:

> "In evaluating management's response to the events of February 4, we note that no Pullman employee previously

> had been discharged for calling his foreman 'a liar.' Although the facts surrounding other name-calling incidents were less extreme than those involved in the instant case, we nevertheless acknowledge [sic] that A. L. Hulsey, a white union official, testified that he had heard other employees tell foremen that they were lying 'many times.' Hulsey also testified that he had said to his foreman, 'Well, Hog Jaw, you are lying there. So and so just told me different.' (Record, vol. 2, at 86.)" (App. 82a, footnote 14).

The District Court's finding was explicit that Pinkard was not fired simply for calling Dave Mason a liar, but for other cumulative reasons:

> "Further justification lies in Pinkard's loud refusal to go to the meeting Mason sought him to attend. This showed his disdain for management as well as the orderly resolution of disputes." (App. 18a-19a)

Also,

> "Pinkard was also discharged for abuse of the grievance procedure. Plaintiff's actions in the King incident were typically extra-contractual . . . .
>
> "The court finds that abuse and admonition characterize [Pinkard's] disregard for established methods in handling grievances . . . . [H]is insufferable attitude during the King incident was simply the final item. He gave the defendant ample justification for his discharge." (App. 19a, 20a)

There was *no* evidence that any other employee disobeyed a direct order as Pinkard did who was *not* fired.[5] The Court of

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[5] Indeed, the discharge of plaintiffs Sealie and Holton for insubordination were sustained in this very same opinion, as Swint's discharge for insubordination had been sustained in *Swint* v. *Pullman-Standard*, 539 F.2d 77, 105 (5th Cir., 1976). There was also uncontradicted evidence of many white employees who were discharged for insubordination, as well as Arvil L. Hulsey's testimony that discharge was the usual penalty for insubordination. "The evi-

Appeals majority simply ignored the District Court's findings of what the cause of Pinkard's discharge actually was, and pretended it was only his calling Dave Mason a liar in saying there were other similar incidents not resulting in discharge, for the only incidents they refer to anywhere were the liar-calling incidents which even they say were "less extreme" (App. 82a, n.14), and of which the District Court had found with ample evidentiary support:

> ". . . no instance of comparable significance was presented . . . . [T]his was no joking matter, as the other occurrences clearly were. It was a venomous retort by a man whose resentment still showed through at trial . . . ." (App. 18a)

It was only through this process of saying that which was not so on the record that the Court of Appeals majority declared the District Court's finding clearly erroneous that no disparity in treatment had been shown. But its reasoning process of independent fact finding whereby it found Pullman-Standard's decision to fire Pinkard was motivated by retaliatory animus, is an even more remarkable piece of casuistry.

First, the majority itself finds Pinkard was guilty of misconduct:

> "This court does not condone Pinkard's action in calling Mason a liar or question management's right to punish such behavior." (App. 86a)

However the Fifth Circuit majority (contrary to the arbitrator who denied Pinkard's discharge grievance and to the District Court, both of whom found against Pinkard on the facts) made the new finding that discharge was *too severe* a penalty for

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dence was conclusive that most cases of insubordination resulted in termination, whether the employee was white or black." (App. 11a). Likewise, there was no evidence of any other employee who persisted in extra-contractual grievance procedures after warnings and orders not to, who was not fired.

Pinkard's misconduct, because in assessing the penalty Pinkard's misconduct must be balanced against his activism or lawful advocacy:

> "The [District] court's reference to an independent judicial proceeding, combined with its description of the Mason incident as a 'venomous retort by a man whose resentment still showed through at trial, leads this court to the conclusion that the trial court improperly focused on plaintiff's antagonism *without counterbalancing the defendant's own antagonism.*
>
> ". . . The question we are faced with . . . is whether Pinkard's discharge was *the proper punishment* or whether . . . his discharge was an overly severe penalty tainted to an impermissible degree by Pinkard's lawful advocacy of *minority and union rights.* The evidence clearly shows it was the latter." (Emphasis added.) (App. 85a-86a)

Thus the Court of Appeals majority, granting the propriety of some punishment for some misconduct,[6] says that in determining the degree of discipline the employer is obliged to balance against the employee's misconduct and antagonistic attitude it exemplifies, the employee's activism in advocating minority and union [sic] rights and the antagonism it presumes this generates in the employer. In other words, the employer cannot fire the militant activist (Pinkard) for the same misconduct for which discharge of a non-activist (Holston, Sealie) would be a condign penalty. Plaintiff Lofton had also been a steward, had filed numerous grievances and an EEOC charge. Yet no balancing process was even mentioned by either court below in reference to Lofton's claims. Why Pinkard is entitled to balancing and Lofton is not is without any apparent explanation. Finally, the penalty of discharge was held by the majority

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[6] The only misconduct it conceded merited some punishment was his calling Mason a liar. It does not say whether his disobedience of the order to go to a meeting merited any.

not too severe for Pinkard qua Negro;[7] it was too severe for him only qua militant.

The majority palliates its role of ultimate fact finder by some incredible pretensions:

> "We have reviewed all of the testimony carefully. The evidence, *largely uncontradicted*, clearly demonstrates that the discharge of Pinkard would never have occurred but for his union and racial activism . . . . (App. 85a)
>
> ". . . *Credibility of witnesses is not an issue* because there is no significant conflict in the evidence." [Emphasis added.] (App. 86a-87a).

Pullman's Industrial Relations Manager J. R. Hudson testified in regard to Pinkard's discharge:

> "I think the reason for his discharge is very well stated in a letter of February 12, 1976 that was given to Mr. Pinkard and signed by Mr. Johnson, Mr. Moss and Mr. Dave Mason. This is the basis for his discharge . . . ."

The letter read:

> "After careful consideration of your conduct of last week, the Company has concluded that you have been guilty of serious misconduct, including acts of insubordination to Track Foreman Dave Mason. You have been repeatedly warned and cautioned in the past to follow the contractual grievance procedure in handling your own complaints or those of other employees, and that if you want to question Management's orders, you should nevertheless obey them and grieve about them later at a time and in a manner that will not disrupt the orderly operations of the plant. You disobeyed these warnings in addition to your disobedience and disrespectful conduct toward Mr. Mason. Based on these matters and a careful review of your entire disciplinary and work record, we

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[7] "We also agree that the judgment is to be affirmed as to the § 1981 claims of racially-based discharge made by plaintiffs Pinkard and Lofton." (App. 54a).

have decided to discharge you effective immediately upon your receipt of this notice."

Mr. Hudson's testimony was direct evidence of the reason or motivation for Pinkard's discharge. *If it is credited*, then Pinkard was lawfully fired. The only evidence tending to discredit or refute this direct testimony, was the circumstantial evidence respondent claimed to fit the formula set out in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[8] But it is sheer nonsense to say there is no significant conflict in the evidence, for the ultimate issue of actual motivation (or pretext) turns entirely on whether Hudson's testimony is credible or whether its credibility has been overcome by inferences from Pinkard's circumstantial evidence. Credibility is everything in such a case. Nor is there any truth in the assertion that the evidence was "largely uncontradicted." Three pages earlier the majority opinion itself says, "At this point the testimony becomes even more conflicting." (App. 81a) The truth is this was a factual case tried vigorously for four days and many facts were controverted. Hudson's testimony alone covers 240 pages. The District Judge accepted his testimony as true and was clearly unfavorably impressed by Pinkard's demeanor. Credibility determinations are all-important in such a case and to say they are not an issue is as much as to say, "Don't bother me with facts, my mind is made up." For say what they may, the majority necessarily made a tacit credibility judgment in rejecting Hudson's testimony as false.[9]

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[8] Among other deficiencies in circumstantial proof according to this formula, was the absence of any proof that Pinkard was replaced by either a non-militant or a non-minority employee.

[9] Ignoring completely the direct evidence, as the court below did in this case, is in marked contrast to the treatment of direct evidence in *Lee* v. *Russell County Board of Education*, ___ F.2d ___, 29 FEP Cases 1508 (11th Cir., September 1, 1982), where direct evidence was characterized as "apparently highly probative" which could not be disbelieved by the trier of fact without "some indication of the court's reasons for rejecting [sic] this evidence." It is true that the

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW ERRED BY DISREGARDING THE "CLEARLY ERRONEOUS" STANDARD RULE OF 52(a), AND EXCEEDING ITS APPELLATE AUTHORITY, THEREBY ENGAGING IN "PRECISELY THE HISTORICAL PRACTICE OF THE FORMER FIFTH CIRCUIT CONDEMNED BY THE SUPREME COURT IN *PULLMAN-STANDARD v. SWINT*, ___ U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)."—

It is the height of irony that the promise of *Swint* is so quickly broken, in a case involving not only the same or successor Court of Appeals, employer, and plant, but also involving a member of the plaintiff class in *Swint*, Mr. Louis Pinkard. *Swint* is both *stare decisis* and *res judicata* in this case.

The attempt by the majority below to distinguish *Swint*[10] seeks to confine its application narrowly to situations where the trial court did not make a finding on a material fact or where a legal error vitiated a finding. Outside those confines the majority considered itself free to carry on its historical practice of independent fact finding when it did not like the end result.[11]

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direct evidence there referred to was favorable to the plaintiffs, but also true that the court below, acting as trier of fact, gave no reason for discrediting Hudson's direct evidence, but gave a false explanation that "there is no significant conflict in the evidence." Direct testimonial evidence as to motivation cannot be "apparently highly probative" in one case and insignificant in another. Appellate fact-finding based on such inconsistent and irrational explanations is arbitrary.

[10] See p. 8, supra (App. 87a).

[11] The prevailing philosophy of the 5th and 11th Circuits in this regard are described at length in an article by Honorable John Godbold, Former Chief Judge of the old 5th and presently Chief Judge of the 11th Circuit. This article was published after the *Swint* case was decided, entitled "Fact Finding by Appellate Courts—An

Petitioner submits that this is a gross distortion of *Swint* and that both the majority's premises, major and minor, are entirely untenable. The question is of fundamental importance in the proper administration of justice in this Circuit and certiorari is justified in this case for quite the same reasons it was granted in *Swint;* indeed, there is more need now than ever, because the court below is now manifestly recalcitrant and shows itself still unwilling to relinquish its "historical practice" of independent fact finding.

The major premise: That the *Swint* holding is limited to the two narrow situations set out in the quotation, p. 8 *supra*, and

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Available and Appropriate Power", 12 Cumberland Law Review 365, 378, 379-380 (June, 1982):

> "As the exceptions proliferated the courts moved toward the position that the circumstances in which they could make findings of fact on appeal were not limited to a few fixed situations but were governed by a general principle: "*findings of fact may be made if 'a complete understanding of the issues may be had without the aid of separate findings' by the district court*, that is, *if the factual issues "may be fairly resolved" from the record presented.' Appellate fact finding is now a matter of general discretion and no longer a question of whether narrow exceptions are available to cover the individual case.*
>
> * * *
>
> ". . . Appellate fact finding will not improperly displace the district court's findings when the district court inadvertently overlooks a necessary factual matter, or when a necessary factual matter is purposefully not addressed because the district court rules on one ground *but the appellate court chooses to take a different view of the case.* Nor is the appellate court limited to supplying a 'missing' fact that is absent in the first instance; *the court of appeals may itself create the factual vacancy by holding that the trial court was plainly wrong in what it found or that the finding was made with an improper legal standard in mind.*" [Emphasis added.]

In other words, it finds the facts whenever it thinks it is fair to do so. The instant case preserved the historical practice whenever the narrowest possible construction of *Swint* can be said to be distinguishable.

that in all others the Court of Appeals may continue to find facts independently. This Court had just such a case before it in *White-Wilson Medical Clinic* v. *Robbins*, ___ U.S. ___, 102 S.Ct. 2229, 72 L.Ed.2d 842 (1982). In that case the trial court had considered and ruled on *all* the factual disputes and did not express *any* erroneous view of the law: the same Circuit, however, rejected the District Court's ultimate finding in favor of the employer as clearly erroneous purely as a matter of fact and then independently found as a fact that the employer was guilty of racial discrimination. On petition for certiorari, the Supreme Court three weeks after it had decided *Swint*, granted the writ, vacated the judgment and remanded the case to the Court of Appeals "for further consideration in light of *Pullman-Standard* v. *Swint*, 456 U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)." If *Swint* has no application in such a case, why did this Court order an exercise in futility such as that? Furthermore this Court in *Swint* was construing Rule 52(a) which has application to all civil cases tried without a jury. There is no reasonable basis in that decision for according to it a grudging application as the court below did in this case. The dissenting Judge, Lynne, was clearly correct that *Swint* applies in this case.

Minor premise: But even if that major premise were correct, in its opinion below the panel majority did nevertheless "resolve in the first instance a factual dispute which had not been considered by the District Court." The trial court found that Pinkard had failed in the first stage in his burden of proof; that he had not shown any disparity in treatment. It never reached the question whether Pullman even though having mixed motives would have fired him for his several acts of insubordination absent his militant advocacy of minority and union rights. As Judge Lynne's dissent pointed out (App. 88a), "such a finding was not made." Even by its own narrow construction of *Swint*, it would have to remand for the trial court to decide that factual issue. Furthermore, insofar as an "erroneous view of the law" can be said to have entered into the trial court's *Swint* decision, *i.e.*, its alleged failure to weigh the

Machinists Union's alleged racism in determining the bona fides of the Steelworkers' seniority system, so likewise the majority below found the same kind of alleged "erroneous view of the law" entering into the trial court's decision here, *i.e.*, failing to weigh Pinkard's advocacy of minority and union rights as a relevant mitigating factor counterbalanced against his misconduct, in determining the appropriateness of discharge as discipline for his misconduct. Even by its own narrow construction of *Swint*, then, the court below should not have assumed the role of independent fact-finder but should have remanded to the District Court for further factual findings.

Any way you look at the decision below, it conflicts irreconcilably with the *Swint* decision. Additionally, there is a demonstrated need for clarification of the "clearly erroneous" standard where there is evidence to support the District Court's findings. "Firmly convinced that a mistake has been made" is too easily equated to "disagree with the outcome" by appellate courts with the philosophy described in footnote 11, destroying important checks and balances in the judicial system.

II

THE COURT OF APPEALS ENGAGED IN REVERSE DISCRIMINATION BY WEIGHING RESPONDENT'S MILITANCE AGAINST HIS MISCONDUCT, AS A MITIGATING FACTOR IN DETERMINING THAT DISCHARGE WAS TOO SEVERE; IT THEREBY PLACED HIM IN A BETTER POSITION THAN A NON-MILITANT WHO COMMITTED THE SAME MISCONDUCT WOULD HAVE OCCUPIED.—

The Court of Appeals used this language, "the trial court improperly focused on plaintiff's antagonism without counterbalancing the defendant's own antagonism." (App. 85a). Finding that the respondent was guilty of some misconduct meriting some punishment, it said the question of lawfulness of the discharge was one of degree involving balancing Pinkard's

"antagonism" against Pullman's "antagonism." However, Pinkard's misconduct certainly must enter into the equation of assessing condign punishment; and just as surely employer "antagonism" attributable purely to misconduct is not at all reprehensible or unlawful. The only intelligible meaning that can possibly be ascribed to the majority's language is that Pinkard's misconduct has to be weighed against his protected conduct. This analysis is fully confirmed by the following finding of fact that Pinkard's discharge was "an overly severe penalty tainted to an impermissible degree by Pinkard's lawful advocacy of minority and union [sic] rights." (App. 86a) For this shows that the court below was actually weighing lawful advocacy against misconduct in deciding appropriateness of the penalty.

If it were simply a matter of weighing employee "antagonism" against employer "antagonism", this means that the more an employer dislikes the employee for whatever reason, the harder it is to fire him. Of course, this is not equality of employment opportunity, but patent inequality and completely arbitrary.

If it is a matter of weighing protected conduct against misconduct, this means that the more militant an employee is, the more misconduct it takes to fire him. Again, this results in patent inequality of employment opportunity, in which the activist is the beneficiary of reverse discrimination. This is precisely contrary to *Mount Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977), dealing with the proof of causation in "mixed motive" cases.[12] The Court pointed out that

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[12] Among the circuits whose decisions are in conflict with the instant case on this point is the First Circuit. *N.L.R.B.* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, at 673-674 (1st Cir., 1979):

> "The Board has every right to criticize an employer for truly disparate treatment and draw adverse inferences therefrom, but a matter such as absenteeism involving many elements, such as length of service, frequency, the pattern, if any, the likelihood

there is reverse discrimination present whenever a requirement of proof of a higher degree of misconduct is imposed, to fire a person who has engaged in some protected conduct, than is required to fire someone who has not:

> "A rule of causation which focuses solely on whether protected conduct played a part . . . in a decision not to rehire, would place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."

Note that Holston, Sealie, and Pinkard were *all* discharged for insubordination. The former two were not shown to be activists, and for that reason alone they came out less favorably than Pinkard. Also Pinkard himself was found not to have been discriminated against on account of his *race*. Therefore, the penalty of discharge was not excessive for Pinkard qua Negro, but was excessive for Pinkard qua militant. Certainly this is not equal treatment, but discrimination in favor of militants.

In *Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 577-78 (1978), the Court referred to the employer's burden—

> ". . . of proving that he based his employment decision on a legitimate consideration, and not on an illegitimate one such as race . . . [H]e need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII . . . does not impose a duty to

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of a valid excuse, and the failure to call in, is a subjective mix. Within reasonable limits the employer must be permitted to run its business without the fear of second guessing by the Board. To hold otherwise would cause an apprehensive employer to give union activists the benefit of special treatment, an unfairness we commented upon as long ago as NLRB v. Billen Shoe Co., 1 Cir., 1968, 397 F.2d 801, 803. As the Court noted in Mt. Healthy, ante, at 286-87, the exercise of rights must not spill over to effect an advantage elsewhere. See Liberty Mut. Ins. Co. v. NLRB [592 F.2d 595] at 602 [1st Cir., 1979]."

> adopt a hiring procedure that maximizes hiring of minority employees . . . ." [Emphasis in the original.]

Section 1981 similarly does not impose a duty to adopt disparate disciplinary standards that maximize employment tenure of racial militants. While the evidence showed that discharge was the standard penalty for insubordination at Pullman, and the arbitrator sustained Pinkard's discharge on that basis, the majority below say some discipline of Pinkard was justified, but give no indication of how much. The majority requires some sort of undefined subjective gradation so that the more militant an employee is, the more misconduct he can engage in without being fired. Judge Lynne's dissent aptly scorns this theory of disciplinary calculus: "as though insubordination may easily be quantified." (App. 88a) Pinkard's discharge had been determined not to be too severe a penalty, through arbitration, the method provided for in the union contract for resolving that type of question. Having been sustained by the arbitrator and Judge Guin, both of whom saw and heard the witnesses testify, and approved in Judge Lynne's dissent, it is certainly far from an objective judgment by the two-judge majority that the discharge was too severe. Reasonable men could be of the opposite opinion; indeed, the arbitrator and two judges were. The Court of Appeals' subjective judgment imposes reverse discrimination in favor of militants, not equality of treatment.

> ". . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. *If both are not accorded the same protection, then it is not equal.*

> ". . . [W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations." (Emphasis added.) *University of California Regents* v. *Bakke*, 438 U.S. 265, 289-90 (1978).

The program imposed by the court below to require preferential treatment of Pinkard and other militants does not fall within the permissible area defined by *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), for voluntary affirmative action

plans, rather it constitutes a form of reverse discrimination contrary to the *Mount Healthy*, *Furnco*, and *Bakke* cases.[13]

The Court should grant the writ of certiorari because the decision below conflicts with applicable decisions of this Court, because of the conflict on this point among the circuits, and because the question presented is of great importance to employers and employees in the attainment of equal employment opportunity and in the maintenance of labor peace.

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[13] Where a militant has given an employer as much reason to fire him as would suffice to fire some non-militant employee, the militance demands no reduced disciplinary sanction. *Emporium Capwell Co.* v. *Community Organization*, 450 U.S. 50, 71 (1975). Militance cannot be weighed against misconduct in determining the appropriateness of the disciplinary sanction, then if the discipline is found too severe as a result of such balancing, have the inference of excessive severity used as evidence of pretext. Under *Mount Healthy*, *supra*, the question whether Pinkard would have been fired for the misconduct, must be decided by prescinding it from, not by balancing it against the protected conduct. Otherwise, the reasoning is circular: He is a militant, therefore, the penalty should be less than it would be for others; the penalty is not less, therefore he was fired for militance. The trier of fact must consider under *Mount Healthy* whether Pullman would have fired Pinkard for the totality of his misconduct (as it fired Holston and Sealie for their insubordination) considered *alone*, and *not* counterbalanced, *i.e.*, not according any preferential treatment to Pinkard because of his activism. The majority below placed Pinkard in a "better position as a result of the exercise of . . . protected conduct than he would have occupied" had he not engaged in protected conduct, just as *Mount Healthy* says should not be done.

III

SECTION 1981 DOES NOT CONFER JURISDICTION OVER CLAIMS OF EMPLOYMENT DISCRIMINATION OR TO PREFERENTIAL TREATMENT, ON ACCOUNT OF LAWFUL ADVOCACY OF MINORITY AND UNION RIGHTS.—

The court below said the Civil Rights Act of 1866, 42 U.S.C.A. § 1981, prohibits discharge on account of lawful advocacy of minority and union rights. Its only reasoning to support this was that:

> "In this circuit, it is well settled that 'Section 1981 is a parallel remedy [sic] against discrimination which may derive its legal principles from Title VII.' " (App. 75a)

Evidently this means they are substantively equivalent or coextensive. However, although this view was quite widely entertained up until this Court's decision in *General Contractors Ass'n* v. *Pennsylvania*, ___ U.S. ___, 102 S.Ct. 3141, 73 L.Ed.2d 835 (June 29, 1982), that decision held to the contrary, that they are not equivalent substantively. It held that actual, subjective racial motivation must be shown under § 1981 even in "disparate impact" cases in which, under Title VII, such motivation need not be shown. Section 1981 also says nothing about retaliation or advocacy. Nor does it refer in any way to union rights.[14] It simply reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and

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[14] Though referred to by the court below as part of the reason it claims Pinkard was fired, discharge for union advocacy would seem to be within the exclusive jurisdiction of the National Labor Relations Board, and in any event not within § 1981. The court below improperly treats § 1981 as an omnibus charter to fashion a body of law to remedy all real or imagined injustices in the work place, and to review arbitration awards de novo, which is certainly without basis in the statutory language or history.

> proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, pains, taxes, licenses and exactions of every kind, and no other."

Clearly this creates no right to *preferential* treatment for anyone. In *General Contractors Ass'n*, supra, the Court reviewed the legislative history of § 1981 at length, concluding:

> "The supporters of the bill repeatedly emphasized that the legislation was designed to eradicate blatant deprivations of civil rights clearly fashioned with the purpose of oppressing the former slaves. To infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern."

Justice Stevens, concurring in part, said:

> "I do not believe Congress intended § 1981 to have any application at all in the area of employment discrimination generally covered by Title VII of the Civil Rights Act of 1964 . . . ." 102 S.Ct. at ____, 73 L.Ed.2d at 835.

In *Georgia* v. *Rachel*, 364 U.S. 780, 790 (1966) it was said:

> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase 'as is enjoyed by white citizens.' That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected."

And in relation to a claim that an employee was fired in retaliation for his lawful advocacy of equal employment opportunity for women, in *Great American S. & L. Ass'n* v. *Novotny*, 442 U.S. 366, 376-77 (1979), the Court said:

> "The right Novotny claims under § 704(a) did not even arguably exist before the passage of Title VII."

Section 704(a), 42 USCA § 2000e-3(a) reads in relevant part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful

> employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Because of the substantial limitations of the scope of § 1981 represented by *General Contractors Assn* v. *Pennsylvania*, *supra*, it seems the court below may have assumed too uncritically that jurisdiction existed under that statute to adjudicate claims of retaliation for advocacy of minority and union rights.

Furthermore, the requirement of proof of actual, subjective purpose or motivation under § 1981 appears to us to be absent here.[15] What we have here is two judges who declare that Pullman should have given Pinkard preferential treatment on

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[15] *Gay* v. *Waiters Union, Local 30*, ___ F.2d ___, 29 FEP Cases 1027 (9th Cir., 1982) held that the actual motivation which must be shown under § 1981 is not shown by inference from quantitative proof, or proof of differences in degree, unless there is "a clear pattern, unexplainable on grounds other than race [;and] absent a 'stark' pattern, 'impact alone is not determinative . . . .'"; citing in support *Swint*, ___ U.S. ___, 102 S.Ct. 1781 at 1790."

> "Discriminatory intent . . . means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive."

This holding is contrary to the lower court's decision herein which inferred or presumed a retaliatory motive from its own quantitative judgment that the degree of discipline was excessive because it should have been mitigated for activists, without a bit of proof of any clear pattern; the only instance wherein even the majority found discrimination was Pinkard's. Further authority that intentional discrimination cannot be inferred from a court's subjective value-judgment is found in *County of Washington* v. *Gunther*, 452 U.S. 161, 181 (1981); *Gerlach* v. *Michigan Bell Telephone Co.*, 501 F. Supp. 1300, 1321 (E.D.Mich., 1980); and *Power* v. *Barry County*, 539 F. Supp. 721, 723-24 (W.D. Mich., 1982).

account of his burdensome extra-contractual grievance handling. Several other circuits have rejected the idea of preferential treatment in such cases. *Hochstadt* v. *Worcester Foundation*, 545 F.2d 222 (1st Cir., 1976); *Hernandez* v. *Alexander*, 607 F.2d 920 (10th Cir., 1979). In sustaining a transfer and a discharge for unreasonable complaint making activity, against the charge of retaliation, both these Circuits recognized a necessity of balancing the employee's rights to protest against the employer's interest in operating without unreasonable disruption. This concept of balancing is just the opposite of the Eleventh Circuit's, for it limits the extent of privileged militance, it does not give the militant special privileges. Certainly those Circuits' concept of balancing did not give Hernandez and Hochstadt any privilege of *looser* disciplinary standards, rather it placed reasonable limits on the manner and extent of their protest activities, a concept rejected by the Eleventh Circuit, which says if you allowed Pinkard a little flexibility, you lost forever your right to set any limits to his non-contractual grievance handling, even by union contract. That Pullman did not think Pinkard was entitled to preferential disciplinary treatment but to be treated the same as other insubordinate employees is a far cry from the *purposeful* discrimination prohibited by § 1981.[16]

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[16] Furthermore, since *General Contractors Ass'n* v. *Pennsylvania*, *supra*, has put to rest the idea that § 1981 is substantively coextensive with Title VII, it may be pointed out that the former says all persons will have the same right to enforce contracts as white citizens, and no other. This immediately calls into question whether the holding in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 987 (1971), that an arbitration award adverse to the plaintiff is not conclusive in a Title VII case, has equal application to a § 1981 case. A white citizen whose discharge has been sustained in arbitration, is bound by the award in a subsequent action on the contract, unless he proves his union breached its duty of fairly representing him. Should not a black or a militant have to prove a breach of fair representation too? Otherwise, he is accorded preferential treatment over the white

We believe there is a conflict between the decision of the court below on this point and the decisions of this Court and of other circuits and that the writ of certiorari should be granted.

CONCLUSION

The historical practice of the former Fifth (now Eleventh) Circuit, still persisted in after *Swint*, reflects upon the integrity of the judicial system at all levels: on the District Court, for the futility of its efforts at fact finding; on the Court of Appeals itself, for its undue assumption of judicial omnipotence; and on the Supreme Court, for the facile and unrestrained disregard of its decisions. To allow this historical practice to continue is at war with the institutional framework of

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citizen, which § 1981 does not require. At the trial Pinkard's lawyer stated (Tr. 322-323):

> "MR. CLEMON: Your Honor, *we will stipulate that the [arbitration] case was fairly tried. That Mr. Pinkard was fairly represented.*"

If Mr. Pinkard is to have an equal right to enforce contracts to that of a white citizen, no breach of § 1981 could occur in view of the result of the arbitration, adverse to Mr. Pinkard, it having been stipulated that there was no breach of the duty of fair representation, which fact would preclude a white citizen from recovering for breach of contract under LMRA § 301, 29 U.S.C.A. § 185; equality of right to enforce contracts requires that Pinkard also be precluded from recovery under § 1981. See also *Davis* v. *U.S. Steel Supply*, ___ F.2d ___, 29 FEP Cases 1202 (3rd Cir., 1982), holding that an adverse state court judgment is conclusive on the plaintiff in a § 1981 action; and *Becton* v. *Consolidated Freightways*, ___ F.2d ___, 29 FEP Cases 1078 (6th Cir., 1982), a suit under § 1981 claiming discharge on account of race and retaliation; it was held that the arbitration award sustaining the discharge was sufficient articulation of a reason and of the degree of punishment, so that wrongful motivation had to be proved by plaintiff without weighing activism in determining sufficiency of evidence of misconduct to justify the degree of discipline.

checks and balances necessary to the existence of a liberal democratic society. The Court should therefore issue a writ of certiorari, reverse the judgment of the Court of Appeals, and remand with directions to enter judgment affirming the judgment of the District Court.

Respectfully submitted,

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APPENDIX A

Louis PINKARD, Edward Lofton, Richard Holston and Donnie Sealie, on behalf of themselves and other similarly situated,

Plaintiffs,

v.

PULLMAN-STANDARD DIVISION, PULLMAN, INC., a corporation,

Defendant.

Civ. A. No. 76-G-0226-S.

United States District Court, N.D. Alabama S. Div. Oct. 31, 1978.

MEMORANDUM OPINION

GUIN, District Judge.

This is an action under Title VII, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981, for redress of racial discrimination. While it appears that there are absent as to plaintiffs Louis Pinkard and Edward Lofton allegations of charges having been filed with the Equal Employment Opportunity Commission (EEOC) and of "Notice of Right to Sue" letters having been issued, defendant admits their existence. Jurisdiction has not been questioned, and the court assumes that plaintiffs will amend their complaint.

This action came before the court to be heard on October 12, 1978, for a determination of whether plaintiffs Louis Pinkard, Edward Lofton, Richard Holston, and Donnie Sealie satisfy the requirements of Rule 23, Federal Rules of Civil Procedure, as to representation in a class action. Plaintiffs claim to represent a class of all black employees of defendant company who were discharged within a period stipulated by the parties, within 180 days prior to the earliest filing with the EEOC of a charge of discrimination by any of the four named plaintiffs.

At the conclusion of plaintiffs' presentation, defendant moved in open court under Rule 41(b), Federal Rules of Civil Procedure, to dismiss the class allegation. Defendant argued that plaintiffs had failed to carry their burden of proof as to typicality of claims, adequacy of representation, or defendant's actions or omissions on grounds generally applicable to the class. After consideration of the motion, the evidence presented and the arguments of counsel, as well as the applicable law, the court is of the opinion that defendant's motion is due to be granted.

Counsel for defendant has furnished the court with an able and expansive brief, with supplementation, in opposition to plaintiffs' class claims. By contrast, plaintiffs have shown little to support their claim, indicating a failure to meet their burden of proof in this inquiry. Defendant in its brief distinguishes between the usual class situation, where common questions of law or fact prevail, and the instant case. Plaintiffs, in opposition, cite a recent Fifth Circiut decision, *Herbert* v. *Monsanto Company, Texas City, Texas*, 576 F.2d 77 (5th Cir. 1978). The court finds the *Herbert* case to be distinct from the question presented here, and defendant's arguments to be persuasive on the point.

While *Herbert* states that "racial discrimination is almost by definition class discrimination," 576 F.2d at 80, the decision is clearly hung on the breadth of the defendant's policies involved there and the wide scope of the statistical evidence that would be pertinent to show those policies. Although nowhere is it explicit in that decision, it would appear to be a hiring discrimination suit. Such discrimination inherently manifests a policy of the employer-defendant and is particularly suited to statistical evidence—in short, given to typicality of claims and interests. The case at hand, however, involves questions of discharge from employment which conversely are best and most fairly adjudicated in light of the facts surrounding each individual occurrence. And where a case involves such special investigation of the claim of every single member of the puta-

tive class, it does not lend itself to trial by the class method. *Reddix* v. *Lucky*, 252 F.2d 930 (5th Cir. 1958).

It was the duty of the plaintiffs in this case to present evidence of the typicality of their claims, yet they did not fulfill this obligation. Nothing was brought up that would compare the treatment of whites with that of the plaintiffs and their alleged class, nor was any mention made of the total employment picture at the defendant's plant. Indeed, judicial notice may be taken of a prior case before this court in which it was shown that defendant hired huge numbers of blacks at its Bessemer facility. It has not been said that defendant is opposed to having blacks on its payroll, and it may in fact not be possible truthfully to say so at all. This would go to subvert a supposition of the existence of a practice or policy on the part of the defendant to discriminate against blacks. Plaintiffs have failed to take up this issue. There has been no showing of any other discriminatory policy or practice on the part of the defendant, such as one to hire and then fire blacks. Furthermore, plaintiff Louis Pinkard, in his testimony before the court, claimed that he was discharged for having stood up, as a union representaive, for his fellow black employees. He then admitted that he knew of no other employee who had been similarly treated. This clearly would serve to deny any nexus, and in no way did this plaintiff affirmatively show commonality between his claim and those of the putative class. Plaintiffs have simply failed to show any typicality here, and their case would be better pursued as an individual action.

Finally, the court observes the concern expressed by the Fifth Circuit in *Herbert*, "with the purpose of Rule 23, to provide for judicial economy in the litigation of similar claims." 576 F.2d at 80. But the economics found there simply do not obtain here. Discharge actions involve basically dissimilar claims, as to which—as noted above—particular study must be made as to each complainant's circumstances. There may well be good cause for at least some firings. These would not be actionable, and claims for their redress would only be frivolous. To disallow class status will only deny baseless claims the

shelter provided by other claims, as to which there may be good cause. Thus it will be less wasteful of judicial resources to allow each cause to be brought separately. Presumably, most if not all those with claims which lack merit know this and will recognize the lack of merit by *not* filing suit. Merited or not, each must stand alone. In this way, the wheat will separate itself from the chaff.

The plaintiffs having failed to carry their burden of proof, the court is drawn to the conclusion that there is essentially no question of fact or law involved here common to the putative case, which would predominate over questions affecting only individual members, and that a class action would be inferior to other available methods for the fair and efficient adjudication of the controversy. The court is therefore of the opinion that defendant's motion to dismiss the class allegation should be granted, and that this case should proceed to trial on the merits as an individual action.

A separate order in accordance with this opinion is contemporaneously entered.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 76-G-0226-S

LOUIS PINKARD; EDWARD LOFTON; RICHARD HOLSTON; and DONNIE SEALIE,
Plaintiffs,

v.

PULLMAN-STANDARD, a division of PULLMAN, INCORPORATED,
Defendant.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
JUN 29 1979

JAMES VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY: Jane T. Doaxe

MEMORANDUM OPINION

This is an action under 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981, arising from alleged racial discrimination on the part of the defendant. A hearing was held pursuant to Rule 23(c), Federal Rules of Civil Procedure, to determine the appropriateness of class certification in this action. By its Order and Memorandum Opinion entered October 31, 1978, the court denied class certification. Trial on the merits of the individual claims ensued.

All four plaintiffs are black males over the age of twenty-one. The defendant is an employer within the definition of 42 U.S.C. § 2000e, *et seq.*, engaged in interstate commerce. All four claimants seek redress for alleged racial discrimination in

being discharged from their respective employment with the defendant. In addition, plaintiffs Pinkard and Lofton alleged that they were discharged because they opposed racially discriminatory practices of the defendant. The defendant denies any racial discrimination in discharging the plaintiffs and raises a number of affirmative defenses in bar to these claims.

Under 42 U.S.C. §§ 1981 and 2000e, *et seq.*, this court is given jurisdiction over suits of this nature. The venue of this suit is not disputed. The court's jurisdiction is not contested as to plaintiffs Holston and Sealie. The defendant takes issue with the court's jurisdiction over the claims of plaintiffs Lofton and Pinkard. There is a discrepancy in the jurisdictional prerequisites as to the claims of these two men, which shall be taken up prior to the court's discussion of their individual claims.

Jurisdiction

The original plaintiffs, Louis Pinkard and Edward Lofton, initially chose to sue under 42 U.S.C. § 2000e, *et seq.*, alone. No allegation of the issuance of a right-to-sue letter was made. Later Richard Holston was added as a party-plaintiff. Still later the plaintiffs amended their complaint to bring in their claim under 42 U.S.C. § 1981, for equal enjoyment of the right to contract. At that time it was alleged that plaintiff Holston had received his right-to-sue letter. No such averments were made as to Pinkard and Lofton. Finally, plaintiffs moved to add Donnie Sealie as a party-plaintiff. It was alleged that Sealie had received his right-to-sue letter. The motion was granted and Sealie was added as a fourth plaintiff. The suit ripened as one with four claims under 42 U.S.C. § 2000e, *et seq.*, but only two based on right-to-sue letters, and four claims under 42 U.S.C. § 1981.

At the Rule 23 hearing, no mention had been made of the original plaintiffs' right-to-sue letters. In the course of constructing its order and opinion later entered on October 31, 1978, the court learned from the defendant's counsel that a letter had been issued. For the purposes of expediting its class

ruling the court reflected its assumption that an appropriate amendment to the complaint would be offered. None ever was, even though it was apparent by the pretrial order entered November 29, 1978, that the defendant would pursue its jurisdictional defenses.

The court's jurisdiction over cases under Title VII depends upon the issuance by the Equal Employment Opportunity Commission (EEOC) of the plaintiff's right-to-sue letter. *Beverly* v. *Lone Star Lead Const. Corp.*, 437 F.2d 1136 (5th Cir. 1971). While in a class action all members need not ask separate EEOC charges, *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), and one particular group of individual plaintiffs has been similarly excused where proof of broadly discriminatory hiring practices was adduced, *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891 (5th Cir. 1977), this court will adhere to the rule in *Beverly, supra*. Wide divergence of facts abounds in discharge actions such as this. As each plaintiff must be examined on the merits of his own case, as documented in this court's Memorandum Opinion of October 31, 1978, so must he stand by his own charge. It would be no fairer to allow the original claimants to hide their haste behind the patience of added plaintiffs than it would be to allow them to depend upon the merits of the others' claims. The sounder rule for discharge actions would be that recited in *Beverly, supra*. Because the facts in *Wheeler, supra*, make its decision inapposite here, this court need not decide whether it is to be followed. The failure of plaintiffs Pinkard and Lofton to await the issuance of the letter before filing suit is thus fatal to their claims under 42 U.S.C. § 2000e, *et seq*.

Pinkard was fired on February 12, 1976; he filed his EEOC charge on February 13, 1976, and his civil action on February 17, 1976. He had no right-to-sue letter then. And, while the EEOC did come around to issuing the letter, it did not do so until August 18, 1978. The court concludes that this would not cure the jurisdictional defect in the Title VII claims of plaintiffs Pinkard and Lofton. The reasons given for the issuance were that suit was pending in federal district court over the same

issues, and that therefore the charge before the EEOC was being dismissed. This is not one of the published conditions for which the EEOC will issue such a letter, according to its regulations. 29 C.F.R. §§ 1601.19 and 1601.28. The defendant should not be adversely affected by the unpublished rules of procedure of an agency. 5 U.S.C. §§ 552(a)(1) and 555(c). Thus the letters are invalid and insufficient to mask the error of plaintiffs' too-great haste in filing their suit.

Despite plaintiffs' counsel's contention that the right-to-sue letters issued Sealie and Holston would suffice to bring Pinkard and Lofton within the purview of the court's jurisdiction, the court is of the opinion that, for the foregoing reasons, it lacks jurisdiction over the claims of plaintiffs Pinkard and Lofton relating to Title VII. Nevertheless, the court has heard several days of testimony. It and only it is now in a position to rule on the merits of this action. Though perhaps out of an excess of caution, the court declines to rest on the threshold finding of a lack of jurisdiction, and will proceed to discuss the merits of all claims, in the interest of judicial economy.

The Individual Cases

I. Richard Holston

Plaintiff Holston was hired by the defendant on February 21, 1974, and assigned to the welding department as a welder. On June 28, 1974, he received a written warning for bad work. Within two weeks, he was given another warning for bad work which was later rescinded. On August 28, 1974, he received a three-day suspension for bad work. On March 13, 1975, he was given a written warning for being absent from his work station during work time. None of these instances did he grieve.

Holston was directed to report to work on July 24, 1975. to the location where he had worked the night before, for a new assignment. Instead, Holston went to a different point some distance away, and sat and waited until around 7:00 P.M. without working. In the meantime, two foremen had been looking for him. When one of the two, Franklin Rodriguez,

finally found Holston, he told the plaintiff to wait at Position One while Rodriguez could arrange his work assignment. Rodriguez returned after 15 minutes or so to find no Holston. He searched for 30 minutes, including the restroom area. When Holston reappeared, he told the foremen he had been in the restroom.

Rodriguez told Holston that he wanted to discuss this in the office. Holston wanted a union steward present and said he wanted to go look for one. Rodriguez said not to, and to wait while he found the steward instead. When Rodriguez returned with the steward, they found Holston was gone again. He returned to say that he had been looking for a steward. They had a conference in the office, after which Rodriguez suspended Holston, subject to being made a discharge as was the custom in disciplinary matters.

The next day a conference was attended by Holston, Rodriguez and representatives of the union and the company. Holston was then fired; the reasons given were his failure to follow direct orders of the foreman and his overall record at Pullman. Plaintiff filed a grievance. The union accepted the company's position without arbitration. No claim has been brought by the plaintiff against the union for unfair representation or racial discrimination.

The plaintiff is charged with the burden of presenting a prima facie case of racial discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The *McDonnell Douglas* formula has been widely followed and flexibly applied even in discharge cases. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976). Besides race and adverse action, plaintiff must show qualification for the job and satisfactory performance thereof. *Evelyn M. Lochan* v. *The B. F. Goodrich Co.*, Civil Action No. 78-G-0344-W (N.D. Ala., filed June 27, 1979); *Whack* v. *Peabody and Wind Engineering Co.*, 452 F. Supp. 1369 (E.D. Pa. 1978). Under the guidelines followed in these cases, the plaintiff has failed to establish a prima facie case. It is indisputable that his work performance was any-

thing but satisfactory. The defendant, moreover, has rebutted the plaintiff's claim in its articulation of a legitimate and non-discriminatory business purpose for the discharge. *Furnco Constr. Co.* v. *Waters*, ___ U.S. ___, S. Ct. ___, 57 L. Ed. 2d 957 (1978); *Board of Trustees, Keene State College* v. *Sweeney*, ___ U.S. ___, ___ S. Ct. ___, 58 L. Ed. 2d 216 (1978). The evidence showed that the plaintiff was a poor worker. He had been grossly out of line on July 24, 1975, by his continued absences and insubordinate behavior with the foreman Rodriguez.

Nor has the plaintiff carried the burden of persuasion in its rebuttal—he showed nothing to convince the court that the defendant's practices were a pretext for racial discrimination. *McDonnell Douglas, supra*. The plaintiff relies on the fact that the foremen were all white and the plaintiff black to find racial discrimination in the discharge. But the evidence was clear that blacks and whites alike had been discharged for comparable offenses. plaintiff pointed to two whites who were less quickly discharged. This can hardly be persuasive evidence in view of the greater seriousness of the plaintiff's conduct. Neither of the whites was shown to have hidden from his foreman after receiving his direct orders. No evidence was presented that any white had engaged in comparable conduct and had not been fired. The plaintiff thus has failed to prove that he was the victim of racial discrimination, and judgment as to his claim is accordingly due the defendant.

II. Donnie Sealie

Plaintiff Sealie was hired on January 30, 1974, as a welder-helper. On December 19, 1974, he received a written warning for tardiness and for jumping shifts, or reporting for the day shift after being ordered to the night shift. He was warned then to follow the instructions of his foreman. Plaintiff did not file a grievance.

On January 10, 1975, plaintiff was grinding sill seams in such a way as to throw sparks on two welders, one black and one white, who complained to the foreman, Ed Hamaker. The

foreman ordered the plaintiff to move so that the sparks would be thrown in a different direction. It is a standing rule, apparently, not to throw sparks on another employee. Nevertheless, plaintiff said he knew what to do and would work the way he wanted to. Sealie testified that he was then suffering with a back problem and told Hamaker that he couldn't work in the suggested position, but the court does not find his account convincing.

Hamaker repeated the order and the plaintiff repeated his refusal. The foreman took the plaintiff to the office where a discussion was held between the two with the department head and a union steward. Sealie was adamant in his refusal to obey the foreman's instructions, and he maintained his insistence with the labor relations assistant. The plaintiff was then discharged. The reasons were given as his refusal to perform as instructed and his overall record. It was remarked that he had been disciplined for a similar offense less than a month before, and that he was counseled at that time that failure to obey the instructions of his foreman subjected him to discharge.

Sealie's grievance was duly filed and disposed of by the union, which accepted the company position and did not arbitrate. No claim has been made against the union, either for unfair representation or for racial discrimination, arising out of the abandonment of his grievance.

For the very failure discussed regarding plaintiff Holston's claim, plaintiff Sealie also has not carried his burden of proof. He had performed unsatisfactorily in the past and persisted in disregarding the explicit instructions of foreman Hamaker. If this does not vitiate any prima facie showing, although the court holds that it does, it does show a legitimate nondiscriminatory reason behind his discharge at the very least. Absolutely no pretext was shown in answer to defendant's articulation. Plaintiff Sealie, as did Holston, relies on the fact that he is black and his foremen were white. Still, the evidence was conclusive that most cases of insubordination resulted in termination, whether the employee was white or black.

Accordingly, judgment is due the defendant as to the claim of plaintiff Sealie as well.

III. Edward Lofton

Plaintiff Lofton had worked for the defendant approximately 25 years when discharged by written notice on December 23, 1975. At termination Lofton was a helper in the paint department. His discharge was the result of an incident which occurred on December 17, 1975, concerning the distribution of handbills. The matter was taken before arbitrator H. Carlton Bryan, whose findings as to the material facts were contained in his Opinion and Award, Appendix A to the court's Memorandum Opinion, and defendant's Exhibit A at trial. Lofton's grievance was denied. The plaintiff has launched a calumnious attack, limning the arbitrator in the Lofton proceeding for his personal racial bias. It appears that while he maintained the Birmingham office of the National Labor Relations Board, the arbitrator refused blacks access to the restroom in his building. This same man, furthermore, refused on several occasions to accept NLRB charges involving racial discrimination, requiring the charging parties to forward their charges to Atlanta.

Regarding the question of weight to be given the arbitrator's report, the Supreme Court has established guidelines, or suggested factors, to be considered in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). These include:

> The existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight.

415 U.S. at 60, n. 21.

The arbitrator has been charged with racial prejudice. His personal competence over Title VII-related is thus in doubt, as

would be the procedural fairness of the arbitration itself. But because the arbitrator was not present at trial to defend himself, and in view of the kind of attack made against him, the court feels it should simply make its own findings of fact. It cannot be held that the arbitrator was prejudiced or his arbitration unfair because he has been absent from, and is not a party, to these proceedings. But there is abundant evidence for the court to make its own rulings without resort to the arbitrator's report.

The court finds the plaintiff Lofton to be a witness of dubious credibility. His account of the December 17, 1975, occurrence is vague, evasive, and given to change. In a prior action charging the defendant with racial discrimination, moreover, he testified as to the 20 grievances he filed between 1965 and 1974. The trial judge admonished the parties on the dangers of exaggeration and perjury at the close of his testimony, indicating that he had thought Lofton to be playing fast and loose with the truth. (Defendant's Exhibit 7, pages 337-338.) This court was similarly impressed with the plaintiff's performance on the witness stand in this action.

The evidence showed that defendant had been plagued for several months with outside agitators distributing inflammatory handbills around its Bessemer plant. This activity was commonly thought to be communist in its inspiration. The usual messages conveyed were designed to instigate unrest among the work force and distrust, if not hatred, of the management. There had been at least two fights caused by such propagandizement, which the plaintiff acknowledged.

The particular handbill involved in Lofton's discharge was distributed on December 17, 1975. It advocated a work slowdown and protested layoffs. Although Lofton's story has taken different forms at different times, the court concludes that he was directly involved in handing out the literature to his fellow workers. The testimony of several witnesses corroborated Lofton's role in the distribution process: he had handbills in hand and was actively seeking to pass them to others. His efforts were met with some rebuke by his fellow workers. No

other person was identified and so implicated under the evidence presented. The exact nascence of the handbills remains uncertain but is immaterial to the issue of Lofton's involvement in handing them out. There was testimony by one man who said that the papers were already there when Lofton arrived at work, but this man actually clocked in after the plaintiff. Lofton also contradicted at trial the story he gave the company the day after the incident had taken place regarding whether the handbills had been passed out at the gate when he came to work. It is still clear that Lofton did distribute the papers, however he came by them.

Great emphasis is placed on the plaintiff's reading ability, which he claims is limited. For this reason he contends he was unaware of the content of the handbills and could not fairly have been disciplined on account thereof. The court places little stock in Lofton's claim. He was for two years a union shop steward and as such had regular dealings with written grievances and the collective bargaining agreement. Nor did he have any difficulty reading his own grievances during his testimony in the earlier trial, after which he drew the admonition discussed above.

Furthermore, even if Lofton had not known what the handbill said, he should have taken reasonable steps to find out. The circumstances alone would have indicated the content of such literature. One fellow worker testified that he knew what the handbill was without reading it, and spurned Lofton's offer of it in no uncertain words. Lofton told the company that he had seen the papers being handed out one morning and related this to a fight. This alone should have put the plaintiff on notice as to the contumacious content of what he was passing around.

Prior to Lofton's discharge, the company had no policy to forbid employees from distributing literature in the bath houses. It was, however, a part of the union contract that no employee was to participate in work stoppages or to interrupt or impede the work. By participating in the distribution of the handbills, Lofton was in violation of the contract. This was the reason the defendant gave in its discharge notice to the plain-

tiff. And just as the arbitrator found the discharge justifiable, so does this court after its independent consideration. Thus, no prima facie case of discrimination has been established: plaintiff was in violation of the contract and therefore was performing his duties unsatisfactorily, as a matter of course. Viewed differently, at the very least this articulates a legitimate, nondiscriminatory reason to discharge the plaintiff, as the law would ask the defendant to show had a prima facie case been presented. Obedience to the contract would obviously be a valid business interest.

Hardly could the cause given the defendant to fire Lofton be construed as pretextual. In the only comparable situation, a white employee named Janet Gould was also discharged for her involvement in distributing similar handbills. Plaintiff points to a rumor which circulated about a like occurrence with Ku Klux Klan propaganda. This incident was not sufficiently elucidated for the court to make any finding thereon, but it was shown that an investigation did occur. Without more, the court can attach no significance to the allegations. Finally, plaintiff in relying upon his relative illiteracy does not persuade the court of his innocence. The evidence is clear that this was not simply an incidenct seized upon by the defendant as opportune for carrying out a vendetta against the plaintiff. There was no showing, moreover, of anything that could be attributed to retribution against the plaintiff for his union activities.

It has not been established that there was any discrimination against the plaintiff, Edward Lofton. Judgment accordingly is due the defendant as to these claims as well.

IV. Louis Pinkard

Plaintiff Pinkard was hired by the defendant in July 1962 and was assigned to the steel erection department. At the time of his discharge, February 12, 1976, he was an assembler. He became active in the union in 1970; he served as shop steward and later as grievance committeman. He testified as a witness for the plaintiffs in the earlier trial alluded to above, *Swint* v. *Pullman-Standard*, CA 71-P-0955-S (N.D.Ala., Sept. 13,

1974). Since his discharge, Pinkard has served as vice-president of the union. His activities in that role will be taken up later.

Plaintiff Pinkard was discharged for reasons given on his termination slip as "serious misconduct, including acts of insubordination to Track Foreman Dave Mason," and abuse of the grievance procedure despite the admonitions of the defendant. Pinkard filed a grievance on February 5, 1976, regarding the background incident which occurred on February 4 and led to his discharge. He filed a second grievance on February 12, protesting the discharge, and a third on February 13, attributing his dismissal to racial discrimination and his past union activities. As chronicled earlier, he filed his EEOC charge and brought this action, prematurely, all within a week of the discharge. Much later, on October 15, 1976, the arbitrator selected by the parties, James P. Whyte, issued his Order and Award denying Pinkard's grievance, Appendix B to this Memorandum Opinion, and plaintiff's Exhibit 6 at trial. Whyte fairly and thoroughly covered the question of discrimination. His expertise was lauded in testimony, and was sufficient for both parties to agree on him.

The *Alexander, supra*, requirements were otherwise met to serve as arbitrator. The court, accordingly, attaches great weight to the findings of arbitrator Whyte, *Alexander* v. *Gardner-Denver Co., supra; Rios* v. *Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972); *Wilson* v. *Woodward Iron Co.*, 362 F. Supp. 886 (N.D.Ala. 1973), and by its independent inquiry into the facts as presented at trial, arrives at similar conclusions regarding plaintiff Pinkard's claim of racial discrimination.

The incident which precipitated Pinkard's discharge involved insubordinate conduct toward Dave Mason. The evidence showed the Pinkard was approached by Neal Bell, a black union shop steward, who asked Pinkard to handle the complaint of Nathaniel King, a black employee. King had been given a written warning slip on a matter concerning which he had earlier received an oral warning. Pinkard recognized this as "double jeopardy." He was apparently unaware that the

written warning had been given, although he had counseled King on tardiness before. No written grievance was filed. He asked Mason for a meeting with the department head, Mason and King to discuss the warning. Mason was pessimistic over what it would accomplish.

Pinkard asked for and received relief, as per the company practice, so he could attend the meeting with the General Foreman, one Moss, and Gilbert, his assistant. In Moss's office, it seems, Pinkard spoke first. Apparently Moss and Gilbert were preoccupied and did not respond. Mason prompted Pinkard to proceed, and Pinkard replied that he would rather go to the main office. Moss then spoke and Pinkard said he wanted King present to discuss his warning. Moss pointed out that the proper procedure had been followed and that King need not be there. Pinkard refused to go any farther without King.

Mason denied Pinkard's request to go to the main office and told him to return to work. Pinkard soon returned to ask Mason's permission to obtain a witness to Mason's denial of the request to go to the main office. Mason agreed, but told Pinkard to return to his work. In Pinkard's absence a meeting was arranged with the plaintiff and Moss, Mason, and Frank Hyde, industrial relations assistant. Mason was told to bring Pinkard back, and went looking for him mistakenly thinking the meeting would concern the King matter.

Mason could not find Pinkard at his job then, but found him instead some distance away a short time later. Pinkard apparently went to find Bell, the steward, and returned to his work station to see Mason there with Bell. Mason told plaintiff of the meeting, which plaintiff refused to attend. Then Mason told the plaintiff that he had been told to go back to work, whereupon plaintiff, in Bell's presence, called Mason a liar. Mason reported the incident to Moss, and ultimately Pinkard was given notice of his discharge, though Mason made no recommendation of any sort in the decision, nor was he asked to make any.

Plaintiff presented testimony which showed that other workers had called foreman liars and had not been discharged. But no instance of comparable significance was presented. It is important to note that Pinkard was a union grievance committeeman; as such, he should be expected to know better than others not to call his foreman a liar. Second, this was no joking riposte, as the other occurrences clearly were. It was a venomous retort by a man whose resentment still showed through at trial some three years later. Third, this one black man castigating another—race was hardly an issue between them.

Plaintiff points to an incident with a white, Arvil Hulsey, who was not discharged after accusing a foreman of lying. The court is not persuaded that Hulsey's case is comparable. Hulsey had witnesses to corroborate his version of what he had been told earlier; Pinkard did not. Here, the witnesses supported Mason. Nor was Hulsey's altercation nearly as grave. Hulsey was laid off for three days, and only reinstated as a part of a strike settlement, as his penalty. And even Hulsey himself said in testimony that discharge was the usual result of insubordination.

It is true that union duties draw committeeman away from their jobs regularly. It is also true that this was the only time that Pinkard unjustifiably did not return to work. His record was not umblemished, however; he had had oral warnings concerned his work conduct in the past. The insubordinate conduct, moreover, means more than his failure to go back to his job. Rather, it was the plaintiff's attitude which sparked his discharge, and his earlier compliance with instructions is immaterial to his run-in with Mason. The court concludes, as did the arbitrator, that it was not the failure to return to work which caused his discharge. Indeed, the order by Mason was ambiguous. But the unprovoked malevolence plaintiff displayed toward the foreman—in the presence of other employees—justified his discharge.

Further justification lies in Pinkard's loud refusal to go to the meeting Mason sought him to attend. This showed his disdain for management as well as the orderly resolution of

disputes. In effect, also, he shirked his duties as union committeeman. Thus he stepped outside of the protection of the union roll. The inevitable conclusion is that plaintiff was in fact insubordinate, that his insubordination was egregious, and that management thereby had a legitimate reason to terminate him. No prima facie showing of discrimination could be found, because no disparity in treatment was established.

Pinkard was told that he was terminated, additionally, for his overuse of the grievance procedure. This charge bears directly upon the plaintiff's claim of discriminatory treatment for his espousal of black employees' rights through the union. The evidence established that the plaintiff did take an active role as committeman, and filed more grievances than his predecessors. Some were frivolous, many were not. This is insufficient cause, as the arbitrator ruled, to support discharge. But, as the arbitrator further ruled, plaintiff's claim to have been discharged for racial prejudice resulting from these activities was unsupported by anything more than his own accusations. No case can be made out for discriminatory treatment on mere hypothesis and suspicion.

Pinkard was also discharged for abuse of the grievance process. Plaintiff's actions in the King incident were typically extra-contractual. Grievances were often handled informally in the interest of settling disputes before putting matters in writing. Grievances often were dropped. Foreman would sometimes ask to resolve problems informally. The company tolerated such irregularity only to a reasonable point, however, and objected to plaintiff's habit of ignoring channels. Although Pinkard never received a written warning, he had had several oral reprimands for proceeding in derogation of the contractual mechanisms. He had been told that if he continued to do so he would risk termination. Yet the company did take great pains not to foreclose him from airing racial problems.

Pinkard was reprimanded in May of 1971 for skirting grievance procedures with a petition to reduce production. He filed an EEOC charge on this occasion, which was dismissed for lack

of reasonable cause. Later that month he made no effort to end an unauthorized work stoppage or to assit in an investigation, although he was then a steward. In February of 1973 Pinkard was orally warned with regard to not working overtime. All accounts of this incident are vague and the court does not find it necessary to its decision. In May 1975 Pinkard sought to pull workers off their jobs to take them to the main office to discuss a work assignment complaint. He was refused and warned to follow standard procedures. The warning was put in plaintiff's record, apparently unbeknownst to him.

The court finds that abuse and admonition characterize plaintiff's disregard for established methods in handling grievances and his relationship with management. His failure to follow through with, and his insufferable attitude during, the King incident was simply the final item. He gave the defendant ample justification for his discharge. By contrast, he gave the arbitrator and has given the court nothing to substantiate his charge of racial discrimination. The arbitrator denied Pinkard's grievance, which decision is supported by substantial evidence as determined by this court. By the rule established in *McDonnell Douglas*, *Furnco*, and *Sweeney*, *supra*, judgment is due the defendant for the plaintiff's failure at his proof.

The court takes note of plaintiff's other involvement in the courts of this district. In *Calvin E. Parker, et al.* v. *Local Union No. 1466, United Steelworkers of America, AFL-CIO; Leonard Lewis; Louis Pinkard; and Arvil Hulsey*, Civil Action No. 76-M-1450-S (N.D.Ala., filed March 15, 1979), the plaintiff was held liable in damages for his actions as vice-president of the Local. There, at a time since his discharge, plaintiff was found to have unlawfully interfered with the rights of Pullman employees. Pinkard was involved in refusing to recognize union members' sentiment not to strike but to work. Under *Parklane Hosiery Co., Inc.* v. *Shore*, ___ U.S. ___, 99 S. Ct. ___, 58 L. Ed. 2d 552 (1979), *Parker* is a conclusory determination as to the plaintiff's misconduct. It is well settled under the labor laws which Title VII was modeled that such behavior would disqualify the plaintiff from

reinstatement, even if the discharge was originally improper (which this was not). *NLRB* v. *Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966); *Ayers* v. *Western Line Consolidated School District*, 555 F.2d 1309 (5th Cir. 1977), vacated and remanded on other grounds sub nom. *Givhan* v. *Western Line Consolidated School District*, ___ U.S. ___, 99 S. Ct. ___, 58 L. Ed. 2d 619 (1979). Furthermore, since this suit is an equity proceeding, plaintiff also disqualifies himself from any equitable relief for being without clean hands. The prejudice actually exposed by the facts in this case is not racial, as charged, but anti-management, as reflected by the plaintiff's attitude and actions.

Discussion

The racial attitudes of the defendant have been on trial before. *Swint* v. *Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976). The courts have once absolved defendant from the charge of prejudice against having blacks on its labor force. Neither individually nor as a whole have the four plaintiffs expressed more than personal suspicions otherwise. Ample cause was shown for the discharges, and this court will not be swayed by bare accusations to find bias that is unproved.

Plaintiffs have submitted statistics which they contend show racial bias by a numerical dispariy of discharges between white and black permanent employees. Defendant presented its own statistical showing of nearly exact conformity of racial makeup in the representative work force as compared to net discharges of all employees. Neither proof is persuasive. Discharge actions demand scrutiny of the merits of each decision, and as such are not significantly aided by consideration of broad statistical data. This is especially true where, as here, there are offsetting presentations for both sides which convey an essentially neutral impression racially.

The court recognizes that the brunt of its discussion has dealt with the plaintiff's lack of proof of discrimination in light of standards set by cases decided under Title VII. Remedies under 42 U.S.C. § 1981 have been widely hailed as distinct

from those under Title VII. Yet the principle of proving a prima facie case of race discrimination under Section 1981 is closely related, if not identical, to that under Title VII. It has been said that the allocation of proof mandated in *McDonnell Douglas, supra,* should be applied to claims under Section 1981. This includes both the plaintiffs' burden of proving a prima facie case and the defendant's burden of articulation in defense. *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Sabol* v. *Snyder*, 524 F.2d 1009 (10th Cir. 1975); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977). Thus the court concludes that its evaluation of the evidence would be the same and that plaintiffs cannot prevail under either or both of the two statutes.

Judgment accordingly will be entered in favor of the defendant on all claims by separate order to be filed contemporaneously herewith.

DONE this 29th day of June 1979.

/s/ J. FOY GUIN, JR.
J. Foy Guin, Jr.
United States District Judge

Appendix A

ARBITRATION BEFORE
H. CARLTON BRYAN, JR., ARBITRATOR
HEARD APRIL 15, 1976

PULLMAN-STANDARD a division
of PULLMAN, INCORPORATED,

Employer

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Union

GRIEVANCE OF EDWARD LOFTIN

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OPINION AND AWARD

I. ISSUES

Was the discharge of grievant Edward Loftin proper under the contract. If not, what is the remedy.

Defendant's Exhibit 8

II. FACTS

Grievant was employed about 24 or 25 years ago as an unskilled employee and has continued in similar employment with the Employer until his discharge on December 23, 1975.

He has been the recipient of numerous disciplinary notices. On one occasion the Employer agreed to withdraw a disciplinary notice upon the Union's guarantee that the Employer would have no more trouble from grievant.

For the past year and one-half the Employer has been harassed by inflamatory and communistic literature being passed out at its gates by strangers. Such literature has also been passed out at the gates of other industrial plants in the Birmingham area. Practically all such literature has contained at least one article defaming Pullman-Standard, referring to it as a vampire, bloodsucker and other such words designed to inflame employees. Such accusations have also been made against the union, accusing it and the Employer of conspiring against the employees. No claim is made that grievant participated in such distribution at the gates.

It is alleged that, on December 17, 1975, grievant distributed within the plant premises a piece of literature which, among other things, suggested a slowdown in work in violation of the contract. After an investigation of this, he was discharged on December 23, 1975.

Union Position

Is is the Union's position that grievant did pick up and handle the literature he is alleged to have distributed to other employees in the bath house on December 17, 1975, but that such literature was already in the bath house before he arrived and, based on the time he arrived at his clock station and the distance from such station to the bath house, it was impossible for grievant to have distributed the literature as alleged. It is the Union's further position that it isn't even alleged that grievant had any connection with the inflamatory material passed out at the gate by strangers and that such literature

should not be considered in the instant case. It is also the Union's position that grievant's past disciplinary record was not discussed at the fourth step of the grievance and should not be considered now. It takes the position grievant should be reinstated and made whole, without penalty.

Employer's Position

It is the Employer's position that, upon being advised grievant had, on December 17, 1975, passed out to employees in the bath house literature advocating a slowdown in violation of the contract, it instituted an in depth investigation of this matter, including a lengthy interview of grievant in the presence of a Union representative. It takes the position this investigation clearly showed grievant's guilt. In view of this, and after carefully considering grievant's employment record as a whole, it determined discharge was warranted and that the discharge of grievant on December 23, 1975, should be allowed to stand.

III PERTINENT CONTRACT PROVISIONS

AGREEMENT

This Agreement dated September 30, 1974 is between PULLMAN-STANDARD, a division of Pullman Incorporated (hereinafter referred to as the "Company"), and UNITED STEELWORKERS OF AMERICA, an international labor organization, (hereinafter referred to as the "Union").

SECTION XXVII
TERMINATION DATE

A. This Agreement of September 30, 1974, effective October 1, 1974, except as otherwise provided herein, shall continue in effect subject to the following provisions.

B. Except as otherwise provided below, the Agreement shall terminate 60 days after either party shall give written notice of termination to the other party but in

any event shall not terminate earlier than October 1, 1977. . . .

SECTION 1
PURPOSE AND INTENT OF THE PARTIES

The purpose of the Company and the Union in entering into this Labor Agreement is to set forth their agreement on rates of pay, hours of work, and other conditions of employment so as to promote orderly and peaceful relations with the employees, to achieve uninterrupted operations in the plants, and to achieve the highest level of employee performance consistent with safety, good health, and sustained effort.

The Company and the Union encourage the highest possible degree of friendly, cooperative relationships between their respective representatives at all levels and with and between all employees. The officers of the Company and the Union realize that this goal depends on more than words in a labor agreement, that it depends primarily on attitudes between people in their respective organizations and at all levels of responsibility. They believe that proper attitudes must be based on full understanding of and regard for the respective rights and responsibilities of both the Company and the Union. They believe also that proper attitudes are of major importance in the plants where day-to-day operations and administration of this Agreement demand fairness and understanding. They believe that these attitudes can be encouraged best when it is made clear that Company and Union officials, whose duties involved negotiations of this Agreement, are not anti-Union or anti-Company but are sincerely concerned with the best interests and well being of the business and all employees. . . .

By such arrangement the parties believe that they, as men of good will with sound purpose, may best protect private enterprise and its efficiency in the interest of all, as well as the legitimate interest of their respective organizations within the framework of a democratic society in which regard for fact and fairness is essential.

SECTION III
RESPONSIBILITIES OF THE PARTIES

B. The Union (its local and international officers and representatives, at all levels) and all employees are bound to observe the provisions of this Agreement.

D. In addition to the responsibilities that may be provided elsewhere in this Agreement, the following shall be observed:

3. There shall be no strikes, work stoppages, or interruption or impeding of work. No officer or representative of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activities. . . .

4. The applicable procedures of this Agreement will be followed for the settlement of all grievances.

SECTION IV
MANAGEMENT

. . . The rights to manage the business and plants and to direct the working forces include the right to hire, suspend or discharge for cause, . . .

SECTION XII
ADJUSTMENT OF GRIEVANCES

Step 4.

In the event that either party concludes that further Step 4 meetings cannot contribute to the settlement of a grievance, the dissatisfied party may by written notice served on the other party within ten days from receipt of the answer of the last Step 4 meeting, appeal the grievance to an impartial arbitrator to be appointed by mutual agreement of the parties . . . The expense and salary incident to the services of the arbitrator shall be paid jointly by the Company and the Union. The decision of the arbitrator shall be final.

. . . The arbitrator shall have jurisdiction and authority only to interpret, apply or determine compliance with the provisions of this Agreement and such local working conditions as may be or hereafter be in effect in the plants of the Company, insofar as shall be necessary to the

determination of grievances appealed to the arbitrator. The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement. . .

4. WAIVER OF GRIEVANCE PROCEDURE

Notwithstanding the procedure herein provided, any grievance may be submitted to arbitration at any time by agreement of the parties to this Agreement. . .

a. The effective date for adjustment of grievances relating to:

(1) Suspension and discharge cases . . . shall be determined in accordance with the provisions of Section XIII - DISCHARGE CASES. . .

SECTION XIII
DISCHARGE CASES

Any employee who may be discharged shall be deemed suspended for a period of five (5) days following his discharge . . . If the discharged employee believes he has been unjustly dealt with, then a protest of said discharge shall be filed with the Works Manager within the said five (5) day period of suspension; the matter shall be taken up promptly under the method of adjusting grievances herein provided . . . If no protest is filed within the suspension period or if one is filed and the investigation reveals that the employee is guilty, the discharge shall be deemed permanent.

SECTION XVIII
SAFETY AND HEALTH

E. DISCIPLINARY RECORDS

Written records of disciplinary action against the employee involved for the violation of a safety rule but not involving a penalty of time off will not be used by the Company in any arbitration proceeding where such action occurred one or more years prior to the date of the event which is subject of such arbitration.

When an employee has completed thirty-six (36) consecutive months of work without discipline involving a penalty of time off for violation of a safety rule, prior disciplinary penalties for such offenses not exceeding four days' suspension shall not be used for further disciplinary action.

IV. DISCUSSION

Both parties were afforded an opportunity to present evidence and to examine witnesses. Both filed post hearing briefs. It was stipulated the matter in dispute was properly before the arbitrator for decision.

The evidence, testimony and briefs have been carefully considered and, therefrom, it appears we may be faced with three questions. The first question is whether grievant did, in fact, distribute to employees in the bath house on December 17, 1975, literature advocating a slowdown as alleged. The second question is, if he did, did it constitute improper conduct warranting discipline. The third question is, if he did and if it was, was his discharge on December 23, 1975, the proper penalty. We shall address ourselves to these questions and in that order.

With respect to whether grievant did, in fact, pass out to employees in the bath house on December 17, 1975, literature advocating a slowdown, the Employer submitted numerous copies of statements of employees taken at the time, some of which indicate that he did, some of which indicate a lack of knowledge. Inasmuch as there were employees available who could give direct testimony regarding this and a number of such employees were presented as witnesses by both the Employer and the Union, I am inclined, with one possible exception, to consider such statements only as evidence the Employer did make an in depth investigation of the matter.

Grievant was present during the hearing. It would have been helpful to have listened to his testimony as to exactly what happened and, through direct and cross examination as

well as observing his demeanor and responses, to have formed some opinion as to his credibility. However, he was not presented. Instead, the Employer offered as an exhibit a memorandum of a meeting held on December 18, 1975, at which time grievant was interviewed regarding the bath house incident of December 17th. The interview was conducted in the presence of the Union president. The Union stated it was willing for this memorandum to be a joint exhibit. We shall take up later the nature and content of the literature grievant is alleged to have passed out to employees in the bath house, but first we shall determine whether he did or not.

At grievant's interview on December 18th, he stated the literature in question was already in the bath house when he arrived on the morning of the 17th. He stated he saw fellow workers looking at copies. He also stated a bunch of them was laying right in front of his locker. At one point he stated he wasn't reading the literature. At another point he stated fellow employees asked him what he was reading and he replied, "Here's you some." He claimed he got to work that morning between 6:20 and 6:25, that the literature was already scattered throughout the bath house, that a pile of it was in front of his locker and that he gave copies "out of my hand" to only one or two employees who asked for one. With respect to a fellow employee, Albert Tabb, shop steward, grievant stated when he arrived Tabb had a copy of the literature in his hands but they did not discuss it. With respect to another employee, W. A. Miller, grievant stated he asked Miller if he wanted a copy and Miller replied he "didn't want none of that" (obscenity). Grievant also stated he asked another employee, Ted Brooks if he wanted one. At another point grievant changed his story from claiming there was a stack of the literature in front of his locker to an admission that he had 7 to 10 copies in his hand and that fellow employees asked him for copies. With respect to fellow employee McKinley Hayze, grievant first stated Hayze had gone when he got to the bath house. He then stated Hayze may not have been gone.

At the hearing Hayze testified grievant punched him with his finger and then gave him a copy of the literature. With respect to this and other accounts immediately below we are dealing with events occurring in the bath house at Pullman's plant on the morning of December 17, 1975, and the literature referred to is the particular document grievant is alleged to have passed out at that time. Hayze testified another employee by the name of Small was also present and grievant gave him a copy.

Employee Jack B. Gilmore testified several employees were sitting in the bath house when grievant came around a corner and started handing out copies to each. He testified grievant had not yet changed to work clothes, that the time was somewhere between 6:15 and 6:30 A.M. He stated grievant also gave copies to employees, A. Z. Arnold, Jerry Gwin and Solon Sellers.

A. Z. Arnold testified grievant came in and was handing out copies, giving them to J. B. Gilmore, Sellers and Gwin. He stated grievant had a stack one to one and one-half inches thick.

William J. Smith testified that, when he came in, grievant gave him a copy and said there was a little song on the back. He stated grievant had several copies in his hand and he saw him give copies to Billy Porter and Spurgeon Fields. He stated there were about a dozen employees in the bath house, sitting around reading the literature in question.

Billy E. Porter testified he came into the bath house and changed clothes. He stated that grievant, sitting about 3 lockers down, said, "You like to read. Here is something to read" and handed him a copy. He did not notice Arnold reading but did see copies on the floor about 6:50 to 6:55 A.M. He equated the literature handed him by grievant as about the same as that passed out at the gate.

W. A. Miller testified that, at about 6:20 A.M. he and Ted Brooks were changing clothes when grievant came down and handed him and Ted Brooks copies. Miller felt very strongly

about such literature, relating it to literature being passed out at the gate by strangers. He also related it to a shoot-out he experienced a number of years ago. The literature being passed out at the gate had evoked a fight at the Union hall and, to him, such literature was designed only to create dissention. He stated grievant had a bundle of such literature, probably one-half inch thick. Because of this background he stated he told grievant, "I don't want that pile of (obscenity). I don't appreciate it and I don't appreciate your running it in here to me."

Albert Tabb, shop steward, testified he arrived at the bath house at about 6:15 to 6:20 A.M. He stated there was no literature in the bath house when he arrived. He changed clothes and then went out for coffee. In a few minutes he returned and, at that time, saw copies of the literature in question all around the bath house. He saw no one distribute or hand out such literature. He stated that, when he returned with coffee, he saw grievant changing shoes.

Harry L. Mixon testified he believed he started to work at 6:30 A.M. on December 17th, which would mean he arrived at the bath house some time before that. He stated he did not see grievant, who normally arrived later. He stated he saw copies of the literature in the bath house when he arrived, did not pay too much attention and did not notice anyone reading it but did notice that McKinley Hayze was in the bath house.

Willie Johnson testified he got to the bath house at about 6:40 A.M. and that grievant was sitting by his locker, about 5 or 6 lockers away, changing his shoes. He stated he saw copies of the literature and asked grievant, "What you got there?" He picked up a couple of copies, saw what it was, and put it back.

Alex White testified he got to the bath house at about 6:25 A.M. He stated that, at that time almost everyone in the bath house was reading a copy of the literature in question but he did not see anyone passing it out and did not see grievant that day.

Although there are variations in memories of precisely what happened and there is a dearth of evidence regarding who brought the literature into the bath house, the overwhelming preponderance of the evidence clearly shows that grievant did, in fact, on December 17, 1975, pass out to other employees in the bath house copies of the literature in question, and I so find.

We must next examine the literature in question. It is a yellow sheet of paper 8-1/2 inches by 14 inches, with red printing on both sides. On one side is a drawing and, in large print, the words "The Boss Says: Let 'em go!" The text states, in part, that the Employer needs profits like a vampire needs blood. It demands "an end to the vicious speed-up" and states "We will build on the beginnings of resistance . . ." On the other side of the sheet appears the words and music of a song titled "Slowdown." The first verse of this song is, "Slowdown You work too fast. Slow down Try to make it last. Slow down." The song, throughout, advocates a slow down of work.

Section III B of the contract states, "The Union . . . and all employees are bound to observe the provisions of this Agreement." Part D.3. of this section provides, "There shall be no strikes, work stoppages or interruption or impeding of work. No officer or representative of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in such activities . . ." There is an exception to this provision not here applicable. To pass out literature to employees advocating that they engage in a slow down of production is certainly instigating an interruption or impeding such activity. Thus, in passing out such literature, grievant violated the very contract he is now invoking to protest his discharge. Such conduct certainly warrants disciplinary action and I so find.[1]

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[1] *Federal-Mogul-Bower Bearings, Inc.*, 41 LA 1253; *Rich Manufacturing Co.*, 48 LA 154.

There is a further consideration. It would be redundant to repeat it here but Section I, Purpose and Intent of the Parties, set out above in Item III, is just as much a part of the contract as is the grievance section and the agreement must be considered as a whole.[2] Among other things, Section I states that the Company and the Union encourage the highest possible degree of friendly, cooperative relationships between their respective representatives at all levels and with and between all employees. With this in mind it should be noted that, for over a year now, strangers have been passing out to employees at the gate literature designed to create and advocating dissension among employees, not only against the Employer but the Union as well.

Over the Union's strenuous objection, based on the fact it isn't even alleged that grievant had anything to do with passing out literature at the gate, the Employer was permitted to introduce into evidence numerous copies of such literature. It was the Employer's contention that this literature had caused such dissession among employees as to have resulted in fights and, in this atmosphere, the literature passed out by grievant on December 17th was designed to and did have the effect of more of same. The literature was received for that limited purpose, with the burden on the Employer to prove its pertinence.

On this basis the literature has been carefully examined and testimony relative thereto carefully considered. Two pieces of the literature have been disregarded completely because they show by the dates they bear they were distributed in 1976, much after the incident involving grievant. Interestingly enough, one of these two is the only one using the phrase "The Boss Says: Let 'em go!" The others contain articles attacking the Employer as well as the Union. Some attack so called speedups at Pullman. Much of the literature is not just what is

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[2] Elkouri and Elkouri, "*How Arbitration Works*" at pages 307, 308.

sometimes referred to as communist inspired. It actually bears the communist label and refers to "our common enemy, the capitalist class." It is clear that such literature is designed to create dissention among employees and is directed against the Employer and the Union. Also presented were several copies of literature captioned "Pullman Sparks The Rank & File Speaks." It is stated this literature is published by Pullman workers rank and file committee. These, also, refer to the Employer's so called speed-up campaign. It seems clear that the literature passed out by grievant did appear to be "more of same" and, thus, became more onerous. Witness the reaction of employees Miller and Porter, supra. Such literature was inflamatory and defamatory as well as advocating a violation of the contract. Such literature clearly tends to disrupt employee morale and interfere with the orderly and efficient operation of the plant. The Employer was well within its rights to discipline for such activity.[3]

In presenting its case the Union indicated it felt grievant had not been treated in an even handed manner in that another employee had posted inflamatory and defamatory literature on the bulletin board in the plant, without penalty. The evidence shows that the Employer made an investigation first to obtain the facts, after which the employee in question was discharged.

The Union's post hearing brief cited Grievance No. XVI-C80-61, Arbitration Case No. 65, Continental Can Co., Inc., in which the grievance was sustained on the ground the Company had failed to present convincing proof that grievants were guilty of participating in an illegal work stoppage, as alleged. That case is clearly distinguishable as, in the instant case, the evidence is overwhelming that grievant is guilty of the alleged conduct which was the basis for his discharge. The Union also gave a citation regarding injunctions which is not here applicable.

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[3] *Beaver Precision Products, Inc.*, 51 LA 853.

The Employer stated that, in determining to discharge grievant, it not only considered the evidence disclosed by its in depth investigation of grievant's actions on December 17th but that it examined and considered his disciplinary record as a whole. In this connection it presented a summary of such record as well as numerous supporting documents and testimony. In examining and considering this evidence it is noted that one incident, dated 6-20-63 involved a three day layoff for a safety violation. Another, dated 1-12-72, also involved a warning but no layoff for a safety violation. Both of these are barred from consideration by Section XVIII, subsection E, of the contract. From June, 1963 to November, 1975 there were 15 countable written warnings, several involving 3 to 30 day layoffs. One warning involving possible discharge was withdrawn upon the Union's guarantee grievant would give no more trouble. In spite of this, he was given a 3 day disciplinary layoff on 4-8-75, a written warning for a safety violation on 5-5-75 and another written disciplinary warning on 11-11-75. On this date he was advised that future incidents could result in discharge.

And, so, we come to our third question of whether discharge of grievant on December 23, 1975 was a proper penalty. Considering the entire circumstances of his violation of the contract on December 17th and his disciplinary record as a whole, it appears the Employer was fully justified in discharging grievant, and I so find.

V. AWARD

The grievance is denied.

/s/ H. CARLTON BRYAN, JR.
H. Carlton Bryan, Jr.
Arbitrator

Birmingham, Alabama
August, 19, 1976

Appendix B

In re: Pullman Standard Division Of Pullman, Inc. *And* Local 1466, United Steelworkers of America

ARBITRATOR:	James P. Whyte, selected by the parties
APPEARANCES:	*For the Company* — C. V. Stelzenmuller, Esq. *For the Union* — John C. Falkenberry, Esq.
GRIEVANCES:	February 5, 12 and 13, 1976
HEARING:	July 27, 1976, Carmen Zegarelli, Reporter, transcript received August 19, 1976; posthearing briefs received September 28, 1976.
AWARD:	October 15, 1976

The Grievances. Grievant, Louis Pinkard has filed three grievances which have been consolidated for hearing. The first (J x2), dated February 5 (all dates are in 1976 unless otherwise stated) alleges he was granted relief from work on February 4 to attend to Union business but was thereafter denied the right to discuss the matter with the plant manager and was made the subject of an investigation. The relief requested is that this be made the gist of an unfair labor practice.

The second grievance (J x3), dated February 12, protests his having been discharged and requests reinstatement and back pay.

The third grievance (J x4), dated February 13, alleges his discharge was because of race and union activity particularly as related to the filing of grievances alleging racial discrimination.

The National Labor Relations Board, upon receiving an unfair labor practice charge based on the grievance of February 5, remanded the matter for arbitration under the *Collier* doctrine (R. 27). An arbitration hearing was subsequently held resulting in this Award.

Background. It has been Company's practice, from time to time, to enlist the assistance of Union Stewards and Committeemen in cautioning employees about such matters as habitual tardiness. Track Foreman, Dave Mason, a Black man, so utilized Grievant, a Black Committeeman, in January to speak to one King about his tardiness record. However, apparently unknown to Grievant, Mason also issued a written warning to King dated January 23 (R. 44, 81, 230-231, C xl).

Subsequently on February 4, Mason was advised by Bell, then acting Grievance Committee Chairman, that the warning given King was being discussed. Shortly thereafter Grievant, classified as an Assembler in the Steel Erection Department where Mason is in charge, approached Mason and asked for a reliefman so that he could go to the office of General Foreman (Moss) to discuss the warning given King. Mason replied he would secure the reliefman when he had the time (R. 43, 47, 86, 234-236). Mason then went to Moss' office and relayed Grievant's requests for the reliefman and the meeting. Moss approved both requests, relief for Grievant was provided and he came to Moss' office (R. 48, 49, 87, 118-119, 138).

When Grievant and Mason came to Moss' office, Moss and Gilbert, assistant to Moss, were working on reports. Although the evidence as to what transpired is not clear, it appears that Grievant spoke first but for a moment or two was greeted with silence while Moss continued working on his report. Grievant stated he'd just as soon go to the main office since no one would speak to him. When, then, Moss asked Grievant what he wanted, or what he could do for him, Grievant stated he wanted King brought to Moss' office to discuss the warning given King in January. Moss replied that the proper procedure had been followed and that it was not necessary for King to be present. To this Grievant replied that if King couldn't be present, "forget it" (R. 50, 51-52, 8789, 91, 120, 129-130, 138, 239). It may parenthetically here be noted that no written grievance has ever been filed over the warning given King (R. 48, 120).

Grievant next turned to Mason and asked if he could go to the main office to see the Works Manager. Mason denied this

request and told Grievant to go back to work since there'd be no meeting in Moss' office. While Grievant denied being told to return to work, he admits leaving the office and then returning in three or four minutes to tell Mason he wanted to secure a witness to hear Mason deny him permission to go to the main office. Mason said "OK" and again told Grievant to go back to work. Grievant then again left Moss' office (R. 53, 55, 92, 94, 95, 119, 122, 139, 142, 239-240).

After Grievant left Moss' office and Moss and Mason talked about the situation, Moss called Frank Hyde, an industrial relations assistant, concerning what to do about Grievant. Moss then told Mason to bring Grievant to Hyde's office (a small office in the steel fabrication department) for another meeting. Mason believed the meeting was to concern King but Moss meant for it to concern Grievant and his conduct toward Mason (R. 55, 57, 96, 113, 123, 143).

Mason, complying with Moss' direction, found Grievant about 100 to 150 feet from his work area some twenty-five minutes later (C x2). Mason did not ask Grievant where he had been but told him there would be a meeting in Hyde's office. To this Grievant replied that Company did not select with whom he'd meet (to discuss grievances) and that he wasn't going anywhere. Mason then reminded Grievant that he'd been told to return to his job. Grievant replied that Mason was a liar, that he had not told Grievant to go back to work. Mason then told Grievant that if he wasn't going to Hyde's office to go back to work and Grievant did so. During all this time Grievant's replacement was still on the job (R. 57-58, 66-67, 68, 69, 97, 241).

According to Grievant it would have been useless for him to go back to his job, aside from the fact he was seeking a witness to hear Mason deny him permission to go to the main office, even if Mason had so ordered because of equipment malfunction. Company admitted there was an electrical problem at this time but denied it interfered with work in any way. Company work records in fact show no interruption of production in

Grievant's work area at the time in question (R. 242-243, 301, C x15).

Upon Grievant's refusal to come to Hyde's office Mason reported this fact to Moss. He also told Moss and Hyde that Grievant had not followed his order to return to work. Moss and Hyde further investigated the matter and ultimately Grievant received a notice of discharge dated February 12 (R. 69, 70, 71, 126, 146, 190, C x3, 5). The reasons given Grievant for his discharge were insubordination to Mason, failure to use the grievance procedure properly and his overall work record (R. 73, C x3). Meanwhile on February 9 a meeting was held at Grievant's request upon his allegation that Mason harrassed him in requesting a reason for his having been off work. Actually Grievant had permission to be off at the time in question and normally Mason would have been so advised. But communications failed accounting for Mason's inquiry (R. 74, 104-105, 245-247).

Grievant commenced work with Company in July, 1962. In 1971 he became a Shop Steward in the Steel Erection Department. This was followed by his becoming a Union Grievance Committeeman in 1973 in the same department. At time of hearing he was serving as Vice-President of his local union (R. 228-229).

Except for oral admonitions, Grievant has never heretofore been disciplined (U x1). Yet Company's evidence was directed to showing that his work record was poor and that he abused the grievance procedure both by failing to use it properly and by overusing it (R. 116, 221). Four specific examples of troublesome conduct were stated (R. 198, C x6). On May 5, 1971, Grievant was orally reprimanded for attempting to have employees sign a petition requesting Company to reduce protection from twelve to eight cars per day. He was advised to follow the grievance procedure if he had a complaint. Later, on May 24, 1971, a greivance was filed on the matter but was withdrawn on September 17. On May 6, 1971, meanwhile, Grievant filed an EEOC charge alleging Company had

threatened to fire him because he had complained about working conditions. This charge was dismissed on March 27, 1974 for lack of reasonable cause (R. 258).

On May 7, 1971, Grievant, then a Steward, made no effort to end a 30-minute unauthorized work stoppage about which no grievance was ever filed but as a result of which one employee was terminated. Thereafter Grievant cooperated poorly in Company's investigation of the incident (R. 259).

On February 20, 1973, Grievant, along with three others, was orally warned for failing to work an overtime assignment on February 19, 1973. It was alleged that he walked off the job without giving his foreman any reason in violation of a local working conditions agreement providing one could be excused from overtime for reasonable cause. Grievant denied that any overtime was worked on said February 19 (R. 260).

Finally, on May 21, 1975, Grievant was advised to follow the grievance procedure when he wanted to pull certain employees off the job and take them to the main office to discuss a complaint about job assignments. The assignment had Black workers performing housekeeping duties while white workers in the same area at the time were not so assigned. Grievant was not aware that this matter had been entered in his record (R. 157-158, 177, 265).

In general it was said that Grievant requested relief two or three times a week to attend to Union business without filing grievances (R. 160, 173). In Company's opinion this was excessive compared to Grievant's predecessor as Committeeman (R. 170). Yet it was admitted that Grievant was granted permission to see the General Manager about grievances and had constantly to be reminded to follow the grievance procedure (R. 155). During much of Grievant's tenure as Committeeman, Company permitted two employees to serve full time as grievance investigators (R. 172). Grievant complained about this practice and, as a result, it was stopped in favor of adherence to the grievance procedure (R. 173, 201, 238, C x7).

Although Moss maintained that grievances were normally processed according to the contractually prescribed grievance procedure, Grievant maintained that he, upon Moss' invitation, had often discussed complaints with him without a written grievance having been filed. Gilbert, further, acknowledged it was not unusual for Committeemen to see Moss with oral complaints. And first line supervisors ("A" foremen) to whom oral complaints are submitted frequently discuss them with Moss, the General ("C") Foreman. Of course, some complaints are settled without a written grievance ever having been filed (R. 131, 140, 183, 237).

As to Grievant's abuse of the grievance procedure by overuse, the evidence tended to show that between July 3, 1975 and July 23, 1976, Grievant filed 14 of 31 grievances in the Steel Erection Department exclusive of those relating to his discharge. One resulted in reduction of a written warning to an oral reprimand, Company granted three, three were being, or had been, processed to arbitration, six were denied and one was dropped. In contrast since Grievant's discharge only one grievance has been filed exclusive of those relating to his discharge (R. 204, 207, 225-226, C x8, 14).

Previously, between August 14, 1969 and December 19, 1975, Grievant filed, not including those relating to his discharge, a total of 29 grievances in the Steel Erection Department. Three were processed to arbitration, two were denied, one was sustained and the balance were either withdrawn, abandoned or Company's reply was accepted (R. 208, X x10). Even earlier, on July 28, 1969, a grievance filed by Grievant about work assignments was withdrawn by the Union on August 26, 1969 without prejudice (R. 207, C x9).

Although admitting he had been warned that his job was in jeopardy if he did not follow the grievance procedure (R. 286-287), Grievant believed that his discharge was racially motivated. He was assigned a remote work area upon returning from a Union convention in August, 1973 (R. 270), but Company explained this was because he was then the only

Black Committeeman and it was thought he would be more accessible to grieving employees. Notwithstanding Grievant protested this assignment with the result that Company agreed to pay him a wage differential (R. 271). Otherwise, without being specific, Grievant claimed to have filed grievances alleging racial discrimination which upset Company to the point they were never processed (R. 272-273).

Company, of course, denied that any actions were taken against Grievant because of his race (R. 166). It was pointed out that there are, in fact, two Black Committemen (R. 167) and that disciplinary actions taken against Blacks and five whites had been discharged for insubordination. In processing of grievances hereon five Blacks were denied in Step three, one denied in Step four and one was denied by an arbitrator. Grievances filed by whites resulted in two being denied in Step three, two were apparently not contested and one was denied by an arbitrator (R. 216, C x13).

Otherwise Company denied that Grievant was discharged because he was a Committeeman or that his having filed EEOC charges was a factor in his termination (R. 166).

Other Proceedings. After trial in the United States District Court for the Northern District of Alabama, Company and Union were absolved of practicing racial discrimination. Grievant was one of the class of plaintiffs and the judgment was rendered September 13, 1974 (R. 211, C x11). The case is now on appeal (R. 213, C x12).

The Contract. Section XII deals with adjustment of grievances. The first step is for an aggrieved employee to discuss his complaint with his foreman, with or without the presence of a steward or committeeman. If the matter is not here settled within two days, it must be filed in writing within 30 days after the event giving rise to the complaint to be considered further. The writing is on a prescribed form and is to be signed by the employee and his steward or committeeman. It is to be presented to the employee's foreman. If satisfaction is still not obtained, the matter may be appealed to the superintendent.

Here the steward or committeeman may discuss the matter with the superintendent. If not resolved the matter may be appealed to the Manager of the Works or his representatives in connection with regular meetings of the grievance committee.

Section XIII deals with discharge cases and provides, in substance, that one who believes he has been unjustly discharged may grieve according to a procedure not questioned in this case.

The Issue. Although not stipulated before or at hearing, the evidence in this case and the arguments advanced in post-hearing briefs permit the issue to be stated:

Was Grievant unjustly discharged? If so, what remedy?

Company position. Company did not violate the contract by not permitting Grievant to meet with the Manager of Works or in the way it handled King's grievance. Section XII establishes the procedures for processing a grievance and King never filed a written Grievance. There was thus nothing for Grievant to discuss with Moss. In any event there is no proviso permitting a Committeeman alone to discuss an oral complaint with the Manager of Works.

Grievant's unorthodox methods of handling grievances both before and after the events precipitating his discharge were in violation of the contract. Union activity is not protected when contrary to a labor agreement. In fact a union official should be held to a high standard of contract enforcement.

One of Grievant's most disruptive activities, in addition to filing multiple (many?) grievances, was to demand meetings with whatever Company officials struck his fancy. Not only does continually filing unsubstantiated grievances constitute just cause for discharge, being a union official is not an excuse for repeatedly ignoring grievance procedures. Moreover Grievant went beyond merely ignoring grievance procedures. By repeatedly ignoring the prescribed procedures in the face of constant warnings he was continually insubordinate.

Company had good cause to discharge Grievant for insubordination on February 4. At this time he failed to follow the grievance procedure, called his foreman a liar, disobeyed an order to return to work and disobeyed an order to meet with an assistant personnel manager.

That Grievant was a Committeeman constitutes no excuse for his disobedience. He was conducting no union business with which Mason's order to return to work interfered: he had dropped the King matter and had been refused an extra-contractual request to see the Manager of Works. Moreover the excuse of production breakdown was not well-founded.

Grievant was not discharged for engaging in protected union activity. Actions outside the scope of a labor agreement are not protected. Nor does aggresiveness excuse contract violations. Nor was Grievant discharged because of his race. The only evidence relating to this claim is that Grievant was assigned to the sand pile. Yet he admits this was preferential treatment.

The penalty imposed was not excessive. Insubordination constitutes adequate cause for discharge.

Union Position. The confrontation between Grievant and Mason was nothing more than a normal, heated exchange between a Union official and his management counterpart. Grievant, further, did not call Mason a liar, but simply told him not to lie.

Grievant was not insubordinate. He was gone from his job only 20-25 minutes. During this time he had several discussions with Mason, attempted a meeting with Moss, and went to locate another Union official to help him. At all times Grievant was in the role of Union official and had obtained permission to leave his job.

Grievant did not file an excessive number of grievances. Many were valid and some concerned his own case. Furthermore he was responsible for establishing correct grievance procedures by filing a grievance which resulted in elimination of the "free" men.

Discussion. I. The evidence in this case is insufficient to show that Grievant abused the grievance procedure because of the number of grievances filed by him. There is no evidence that he filed "multiple" grievances in the sense of filing several grievances pertaining to one set of facts. And, although he may have filed more grievances than either his predecessor or successor as Committeman, it is not possible to say that any grievance filed by him was frivolous on its face and therefore filed with the intent not to press an employee's complaint but to annoy and vex Company. The evidence shows, contrary to Company's contentions, that many grievances filed by Grievant were sound and resulted in their being sustained at one stage or another of the grievance/arbitration procedure. Be this as it may, that a union steward or committeeman is now always correct in his interpretation of a collective bargaining agreement or in analysis of a fact situation does not mean that he is abusing the grievance procedure.

II. Neither does the evidence support Grievant's allegation that his discharge was motivated by racial considerations. While it is possible that one Black may show prejudice against other Blacks in order to curry favor with white management, nothing in Mason's dealings with Grievant show such to be the case in their various relationships on February 4 or at other times. Nor does the fact that Grievant was once assigned to the sand pile prove Company discriminated against him so far as his discharge is concerned. Following this assignment, Grievant processed a grievance which was resolved, short of arbitration, in his favor. In any event, there was nothing in this assignment suggesting racial motivation.

Notwithstandiung, Grievant's contention at hearing was that the racial prejudice resulted from his having filed a number of grievances on behalf of various employees which alleged racial discrimination. But nothing specific was introduced into evidence to prove this charge. As the evidence stands, therefore, the mere accusation of racial discrimination is too slender a reed upon which to base a finding of racial discrimination as a fact.

III. Whether or not Grievant's discharge was for just cause depends on whether or not he was insubordinate on February 4, upon whether or not his previous work record supported imposition of the penalty of discharge and upon whether or not his actions were in any way privileged because of his position and activity as a Union representative.

Company has maintained that Grievant was insubordinate in disobeying Mason's order to return to work, in calling Mason a liar, in refusing to attend the meeting with Moss and the assistant personnel manager and in misuse of the grievance procedure by insisting on meetings with Company supervisors contrary to the grievance procedure. Each of these accusations will be considered separately.

It must first be observed that while Mason did tell Grievant to get back to work and that while Grievant failed to do so, the order to return to work was ambiguous. Grievant had told Mason he wanted to obtain the presence of another Union official to hear Mason deny Grievant permission to see the Manager of Works about the King matter. Mason assented to this request but, nearly in the same breath, also told Grievant to get back to his job. Since Grievant was intent on the King matter, it was quite natural for him to believe he could seek the assistance of the desired Union official before returning to work. Thus Grievant's intent was not to refuse an order to work, which clearly would have been insubordinate, but to find a Union official to corroborate Mason's refusal of permission to carry the King complaint to the Manager of Works. It follows that Grievant's failure to return to work was not insubordination.

Although Union has insisted that Grievant did not call Mason a liar when Mason told Grievant to come to the meeting with the assistant personnel manager and reminded Grievant that he had been told to get back to work, the evidence preponderates in showing that Grievant did, in fact, call Mason a liar. Moreover this accusation took place in the vicinity of other employees and tended to erode the authority of Mason as a

foreman. Although one acting as a Union representative in pursuit of union business is immune from discipline for merely being militant or zealous, a rule of reason must be applied. See, Bates Landrer Co., 65-1 ARB para. 8222 (Abernathy 1964) and Lawndale Industries, Inc., 46 LA 220 (McGury 1966). Mason did nothing to provoke Grievant's reaction. Nor were Grievant's words justified by the situation. See, Bordon Company, 31 LA 652 (1958). It must be concluded that Grievant was insubordinate in calling Mason a liar. Even though this was done in the general area of Grievant pursuing what he considered to be Union business, it tended to degrade the grievance procedure. More of this later.

Grievant was also insubordinate in refusing to attend the meeting with the assistant personnel manager. Not only was Mason's order in this regard within the scope of his authority, it followed Grievant's request for a meeting with supervision to discuss the King matter. Grievant's refusal, then, was a demonstrated willful disregard not only for the authority of his foreman but also for the interests of peaceful (albeit irregular) labor relations. A Union Committeeman who strongly urges a meeting with management and then refuses to attend one, even if not on the same subject, cannot be said to be pursuing Union business. At this point his conduct is not merely zealous or even merely aggressive. It becomes obstructive so far as employer-employee relations are concerned.

There is no doubt that Grievant acted extra-contractually by insisting on the meeting with Moss and by requesting a meeting on the same subject with the Manager of Works let alone demanding the presence of another Union official to hear Mason deny him permission to see the latter. There is also no doubt that such conduct was fairly routine so far as Grievant's grievance handling was concerned. Nor is there doubt that this course of grievance-processing varies from the contractually prescribed method.

Yet had Company condoned Grievant's actions so as to estop it from accusing him of abusing the grievance procedure?

There is creditable evidence to the effect that grievances were discussed with Moss prior to being reduced to writing. But there is also creditable evidence, which Grievant did not deny, to the effect that he had been warned that his job was in jeopardy if he continued to ignore the prescribed grievance procedure. It is fair to conclude, therefore, that although Company often allowed Committeman latitude in grievance processing, perhaps because of uncertainty as to the extent union business should be accommodated with production needs. Grievant was on notice that his irregular manner of handling grievances would not forever be tolerated.

In a most significant sense the success of grievance/arbitration as an aspect of collective bargaining depends on adherence to the methods prescribed by the labor agreement. It is the duty of both employees and union officials to pursue the remedies established by the labor agreement in accordance with the procedures there detailed meanwhile refraining from insubordination and other forms of self-help. Failure to follow prescribed grievance procedures serves only to erode and ultimately destroy safeguards of employee rights. This is a result which both union and employer should wish to avoid at all costs. See, National Radio Co., 60 LA 78 (Cox 1973).

Although Grievant has not heretofore been suspended or even warned in writing about his conduct, he has been orally reprimanded and warned upon a number of occasions both for his conduct as a Committeeman and as an employee. By claiming to be unaware that one incident was entered in his record, he tacitly admitted that he knew his personnel file included the others. In each previous instance of misconduct either as a union officer or employee, Grievant's status as a union official was recognized and, accordingly, he was permitted some latitude so far as degree of discipline was concerned. But this does not estop Company from insisting upon adherence to the clear, unambiguous provisions of the grievance procedure, especially in view of the numerous warnings given Grievant, nor from taking disciplinary action when such abuse of the grievance procedure is coupled with insubordination. These circum-

stances justify Company's consideration of Grievant's work record in determining his penalty. It cannot be said that Company acted arbitrarily, capriciously or unreasonably in coming to the conclusion that it had just cause to discharge Grievant.

Award. For the foregoing reasons the grievances are denied.

/s/ James P. Whyte
JAMES P. WHYTE
Arbitrator

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 76-G-0226-S

LOUIS PINKARD; EDWARD LOFTON; RICHARD HOLSTON; and DONNIE SEALIE,

Plaintiffs,

v.

PULLMAN-STANDARD a division of PULLMAN, INCORPORATED,

Defendant.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
JUN 29 1979
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY: JANE T. DOAXE

FINAL ORDER OF JUDGMENT

In conformity with the separte Memorandum Opinion filed contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that final judgment in this action be, and the same hereby is, GRANTED in favor of the defendant and against the plaintiffs; and it is

FURTHER ORDERED that the plaintiffs have and recover nothing of the defendant in this action.

Costs are taxed against the plaintiffs.

DONE and ORDERED this 29th day of June 1979.

/s/ J. FOY GUIN, JR.
J. Foy Guin, Jr.
United States District Judge

APPENDIX C

PINKARD v. PULLMAN-STANDARD
U.S. Court of Appeals,
Fifth Circuit (New Orleans),*

Unit B

PINKARD, *et al.*

v.

PULLMAN-STANDARD A DIVISION OF
PULLMAN, INCORPORATED,

June 10, 1982

I.

The four plaintiffs-appellants in this case—Louis Pinkard, Edward Lofton, Richard Holston, and Donnie Sealie—appeal from a judgment entered in favor of defendant-appellee Pullman-Standard, a division of Pullman, Inc., after a bench trial below. They present a number of issues for our review. Because no members of this panel agree upon all of the issues, we preface the separate opinions with this summary of our positions to explain the disposition of the appeal.

All four plaintiffs, former employees of defendant, brought suit claiming defendant discharged them because of their race. In addition, plaintiffs Pinkard and Lofton claimed they were discharged because they opposed racially discriminatory practices of defendant. The suit ripened as one with the four claims of racially-based discharge presented under 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. The claims of retaliatory discharge

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

made by Pinkard and Lofton were presented under 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1981.[1] Plaintiffs sought to bring the suit as a class action, but the district court denied certification. After a trial on the merits, the court entered a memorandum opinion and granted defendant judgment as to each of the claims.

Most of the issues presented provoked no dissent among us. We are in agreement that the district court properly denied class certification. In addition, we agree that the judgment is to be affirmed as to plaintiffs Holston and Sealie. We also agree that the judgment is to be affirmed as to the § 1981 claims of racially-based discharge made by plaintiffs Pinkard and Lofton.

We part ways only with respect to the Title VII claims of Pinkard and Lofton and Pinkard's § 1981 claim of retaliatory discharge. Even as to the latter, our dispute is narrow. Furthermore, all agree that the judgment is to be affirmed as to Lofton's § 1981 claim of retaliatory discharge. Judge Kravitch and Judge Clark, however, with Judge Lynne dissenting, find that the district court erred in granting defendant judgment as to Pinkard's § 1981 retaliatory discharge claim. Accordingly, the judgment must be reversed as to that one claim. This is the only aspect of the judgment to be reversed.

Our positions as to the Title VII claims of Pinkard and Lofton are somewhat more involved. Pinkard and Lofton had not received the requisite right-to-sue notices from the Equal Employment Opportunity Commission at the time they filed suit under Title VII; subsequently, they did receive notices. Judge Kravitch and Judge Lynne conclude, over Judge Clark's dissent, that the notices Pinkard and Lofton received satisfied the right-to-sue notice requirement and consequently that the Ti-

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[1] For convenience, we will refer to the claims under 42 U.S.C. § 2000e as the Title VII claims and those under 42 U.S.C. § 1981 as the § 1981 claims.

tle VII claims of Pinkard and Lofton were properly before the district court, which thought it had no jurisdiction over these claims but proceeded to consider them "out of an excess of caution." Judge Lynne would affirm the district court's disposition of both Lofton's and Pinkard's Title VII claims. Judge Kravitch, however, would affirm as to Lofton's Title VII claims and Pinkard's claim under 42 U.S.C. § 2000e-2, but would reverse as to Pinkard's claim under 42 U.S.C. § 2000-3. Because of Judge Lynne's position and Judge Clark's view that the claims were not properly before the district court, the judgment must be affirmed as to the title VII claims of Pinkard and Lofton.

In accordance with the foregoing summary, we reverse the judgment as to Pinkard's § 1981 claim of retaliatory discharge and remand for a determination of damages. In all other respects, the judgment is affirmed.

II. Class Action Denial

Louis Pinkard and Edward Lofton filed suit under 42 U.S.C. § 2000e on February 17, 1976, prior to receipt of right-to-sue letters from the Equal Employment Opportunity Commission. Plaintiffs moved to add Richad Holston as a party plaintiff shortly after February 19, 1976, when Holston was notified by the EEOC of is right to sue. Like Pinkard and Lofton, Holston alleged in his EEOC complaint that Pullman discriminatorily discharged him because of his race. On July 28, 1976, Pinkard and Loftom moved to add Donnie Sealie as a party plaintiff, and the court granted the motion on August 11, 1976. Sealie had originally filed an employment discrimination charge against Pullman-Standard on May 6, 1975, alleging that he had been discharged because of his race. The Birmingham District Office of the Equal Employment Opportunity Commission issued Sealie a right-to-sue letter on June 15, 1976. On August 18, 1978, prior to the pretrial hearing in the case, the EEOC

issued Pinkard and Lofton notice of their right to sue the company.[2]

On October 12, 1978, plaintiffs proceeded with a Fed.R.Civ.P. 23 class certification hearing in district court. Plaintiffs sought to certify "a class of all black employees of defendant company who were discharged . . . within 180 days prior to the earliest filing with the EEOC of a charge of discrimination by any of the four named plaintiffs." The court refused to certify the class on the ground that the plaintiffs failed to carry their burden of proving "typicality of claims," as required under Fed.R.Civ.P. 23(a)(3).[3]

It is well settled that, where a case requires detailed investigations of the circumstances surrounding the claims of individual class members, that case does not lend itself to treatment as a class action. Reddix v. Lucky, 252 F.2d 930 (5th Cir. 1958). Similarly, this court recently refused to reverse a district court which had denied class certification in Crawford v. Western Electric Co., Inc., 614 F.2d 1300, 22 FEP Cases 819 (5th Cir. 1980), stating that:

> The fact that plaintiffs are members of the same race as other employees and rejected job applicants whom they seek to represent in a class action is not enough in itself to require a finding under Rule 23 that their representation was adequate or that their claims were typical of the class.

Id. at 1304.

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[2] The reason given for the issuance of Pinkard and Lofton's right-to-sue letters was that suit was pending in federal district court regarding the identical issues, and therefore the Equal Employment Opportunity Commission charges were being dismissed.

[3] Fed.R.Civ.P. 23(a)(3) states, in relevant part:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if . . .
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class . . .

In the instant case the four named plaintiffs bring forward claims which are factually distinct. Consequently, we affirm the district court's finding that plaintiffs failed to meet the procedural requirements justifying class certification. The district court properly distinguished the Fifth Circuit decision, Hebert v. Monsanto Company, Texas City, Texas, 576 F.2d 77, 18 FEP Cases 102 (5th Cir. 1978), that plaintiffs cited as contrary to the Reddix "typicality" test. Although this court in Hebert reasoned that, "[i]f class actions were limited to factual typicality, class actions under Title VII would be impossible because, except in rare cases, the facts would not be identical," the court's decision to certify that class was based additionally upon the fact that plaintiffs had produced substantial statistical evidence of company-wide discriminatory policies. The trial court properly focused upon this distinction, concluding that "the [Hebert] decision is clearly hung on the breadth of the defendant's policies involved there and the wide scope of the statistical evidence . . . pertinent to show these policies." Record Excerpts, at 13. Consequently, we agree that Hebert does not provide a sufficient justification upon which to confer "typicality" in the face of the significant factual dissimilarities of plaintiffs' claims. Accordingly, we affirm the denial of class certification.

III. Title VII

A. Jurisdiction

1. Circuit Judge Kravitch With District Judge Lynne, Concurring.

Appellants Pinkard and Lofton filed charges with the EEOC on February 13, 1976 and commenced this civil action four days later. Neither party had received a right-to-sue letter from the EEOC at that time. They did, however, receive right-to-sue letters on August 18, 1978, prior to the pretrial order and approximately four months before trial. Nevertheless, on June 29, 1979, seven months after the trial, the district court dismissed Pinkard's and Lofton's Title VII claims, holding in its

memorandum opinion that it lacked jurisdiction over the claims because the appellants failed to await the issuance of their right-to-sue letters before filing suit. We hold that receipt of a right-to-sue letter is a condition precedent to a Title VII claim rather than a jurisdictional prerequisite, and that here receipt of the letters by appellants prior to dismissal of their Title VII claims cured their failure to initially satisfy the condition precedent. Accordingly, we reverse the district court.

Before instituting a Title VII action in federal district court, a private plaintiff must file an EEOC complaint against the discriminating party within 180 days of the alleged discrimination and receive statutory notice of the right to sue the respondent named in the charge. 42 U.S.C. § 2000e-5(f)(1); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147, 7 FEP Cases 81 (1974); Nilsen v. City of Moss Point, Mississippi, 621 F.2d 117, 24 FEP Cases 1077 (5th Cir. 1980). 42 U.S.C. § 2000e-5(f)(1) states in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, *shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge* (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

(Emphasis added). This court has not explicitly addressed the question whether the receipt of a right-to-sue letter is a jurisdictional prerequisite, which if not satisfied deprives federal

courts of subject matter jurisdiction or whether the requirement is a condition precedent subject to equitable modification. In answering this question, however, we are guided by the Supreme Court's analysis in Zipes v. Trans World Airlines, Inc., 455 U.S. ____, 102 S.Ct. 1127, 71 L.Ed.2d 234, 28 FEP Cases 1 (1982), in which the Court expressly considered for the first time whether a precondition to a Title VII action constitutes a jurisdictional prerequisite.

In Zipes, the Court addressed whether the timely filing of an EEOC charge is a jurisdictional prerequisite or a requirement akin to a statute of limitations, which is subject to equitable modification. See Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 25 FEP Cases 433 (5th Cir. 1981) (en banc). The Court held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling." Id. 455 U.S. at ____, 102 S.Ct. at 1132. In so holding, the Court first observed that 42 U.S.C. § 2000e-5(f)(3),[4] which confers jurisdiction on federal district courts over claims brought under Title VII, "does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC," and that the timely filing requirement does not speak in jurisdictional terms. Second, the Court found that the sparse legislative history indicates that Congress intended the filing requirement to operate more like a statute of limitations. Third, it concluded that to find the filing requirement a jurisdictional prerequisite would be inconsistent with a prior case law, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8, 95 S.Ct. 2362, 2370 n.8, 45 L.Ed.2d 280, 10 FEP Cases 1181 (1975);

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[4] 42 U.S.C. § 2000e-5(f)(3) states in pertinent part:

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.

Mohasco Co. v. Silver, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532, 23 FEP Cases 1 (1980). Finally, the Court reasoned that holding the requirement to be not a jurisdictional prerequisite but a requirement subject to equitable modification furthers the remedial purpose of the act without negating the particular purpose of the filing requirement, which is to give prompt notice to the employer. id. 455 U.S. at ——-——, 102 S.Ct. at 1132-1134.

The application of the factors considered in Zipes v. Trans World Airlines, Inc. to the precondition involved in this case compels the conclusion that the receipt of a right-to-sue letter is not a jurisdictional prerequisite, but rather is a condition precedent subject to equitable modification. First, we note that 42 U.S.C. § 2000e-5(f)(3), the relevant jurisdictional provision, does not limit jurisdiction to those cases in which a plaintiff has received a right-to-sue letter. Nor does section 2000e-5(f)(1), which requires that plaintiffs receive statutory notice of the right to sue before bringing a Title VII action, speak in jurisdictional terms. Moreover, nothing in the legislative history indicates that Congress intended the receipt of a right-to-sue letter to constitute a jurisdictional prerequisite. Thus, we are not inclined to deviate from the plain meaning of the statute. See, e.g., State of Alabama v. Marshall, 626 F.2d 366, 368-69 (5th Cir. 1980).

The decisions of the Supreme Court and Fifth Circuit are also inconsistent with holding the receipt of a right-to-sue letter to be a jurisdictional prerequisite. Rather the decisions clearly indicate that the requirement is a condition precedent subject to equitable modification. See, e.g., Zipes v. Trans World Airlines, Inc., 455 U.S. ——, 102 S.Ct. 1127, 71 L.Ed.2d 234, 28 FEP Cases 1 (1982); Mohasco v. Silver, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532, 23 FEP Cases 1 (1980); Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280, 10 FEP Cases 1181 (1975); Sessions v. Rusk State Hospital, 648 F.2d 1066, 26 FEP Cases 779 (5th Cir. 1981); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 25 FEP Cases 433 (5th Cir. 1981) (en banc); Clanton v.

Orleans Parish School Board, 649 F.2d 1084, 26 FEP Cases 740 (5th Cir. 1981). For example, both the Supreme Court and Fifth Circuit have held that relief under Title VII may be awarded members of a class who neither filed an EEOC complaint nor received a right-to-sue letter. See United Air Lines, Inc. v. McDonald, 432 U.S. 385, 389 n.6, 97 S.Ct. 2464, 2467 n.6, 53 L.Ed.2d 423, 14 FEP Cases 1711 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747, 771, 96 S.Ct. 1251, 1267, 47 L.Ed.2d 444, 12 FEP Cases 549 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8, 95 S.Ct. 2362, 2370 n.8, 45 L.Ed.2d 280, 10 FEP Cases 1181 (1975); Miller v. International Paper Co., 408 F.2d 283, 1 FEP Cases 647, 70 LRRM 2743 (5th Cir. 1969). This court in Crawford v. United States Steel Corp., 660 F.2d 663, 27 FEP Cases 1084 (5th Cir. 1981) extended the rationale of those decisions to nonfiling plaintiffs in a multiple-plaintiff, nonclass action, holding that in an action involving claims of several persons arising out of a similar discriminatory treatment, not all of them need to have filed EEOC charges as long as one or more of the plaintiffs had satisfied the requirement. Id. at 665. If the exhaustion of the preconditions to a Title VII action, including the receipt of a right-to-sue letter, were jurisdictional, neither this court nor the Supreme Court could modify the requirements to permit nonfiling plaintiffs to obtain relief under Title VII. See Zipes v. Trans World Airlines, supra, 455 U.S. at ____, 102 S.Ct. at 1134. Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 589, 25 FEP Cases 433 (5th Cir. 1981) (en banc). Only Congress can modify those requirements that it has deemed must be satisfied to permit lower federal courts to exercise jurisdiction over a cause of action. See Lockerty v. Phillips, 319 U.S. 182, 187, 63 S.Ct. 1019, 1022, 87 L.Ed. 1339 (1943).

Furthermore, both the Supreme Court and Fifth Circuit have found that the requirement that a plaintiff's Title VII action may be filed within 90 days after receiving a right-to-sue letter is not a jurisdictional prerequisite. See Mohasco Corp. v. Silver, supra; Sessions v. Rusk State Hospital, supra. In Mohasco Corp. v. Silver, supra, the Supreme Court observed

that the respondent had not satisfied the requirement that a party file suit within 90 days after receiving a right-to-sue letter. However, rather than dismissing the action *sua sponte* as it would have done were the requirement a jurisdictional prerequisite, the Court considered the case properly before it because "[p]etitioner did not assert respondent's failure to file the action within 90 days as a defense." Id. 447 U.S. at 811 n.9, 100 S.Ct. at 2489 n.9. See Zipes v. Trans World Airlines, Inc., supra 455 U.S. at ____, 102 S.Ct. at 1134. In Sessions v. Rusk State Hospital, 648 F.2d 1066, 26 FEP Cases 779 (5th Cir. 1981), this court expressly held that the 90-day filing requirement is not a jurisdictional prerequisite, but rather a requirement subject to equitable modification. The requirement that a plaintiff receive a right-to-sue letter before filing suit is implied from the provision that a plaintiff may bring suit within 90 days after receiving statutory notice of the right to sue. We discern no reason for treating the 90-day filing requirement as a condition precedent in the context of determining whether a civil action has been timely filed and treating that same requirement as a jurisdictional prerequisite when considering whether a plaintiff received statutory notice of the right to sue before bringing suit.

Finally, in Clanton v. Orleans Parish School Board, 649 F.2d 1084, 26 FEP Cases 740 (5th Cir. 1981), we considered circumstances similar to those in this case. There, the appellee contended that the district court lacked Title VII jurisdiction because the right-to-sue letter was issued by the EEOC rather tan the Attorney General as required in a case involving a governmental entity under section 2000e-5(f)(1). We rejected this contention, stating "[w]hatever the merits of this contention, the fact that the wrong agency issued the initial right-to-sue letter is not dispositive, for on August 2, 1974, Streams, Marion Davis and Clanton received right-to-sue letters from the Attorney General, and under established law, this subsequent issuance of proper right-to-sue letters cured any defect that existed with respect to the original right-to-sue letter." Id. at 1095 n.13. See Henderson v. Eastern Freight

Ways, Inc., 460 F.2d 258, 4 FEP Cases 726 (4th Cir. 1972), cert. denied, 410 U.S. 912, 93 S.Ct. 976, 35 L.Ed.2d 275, 5 FEP Cases 1224 (1973). Here, Lofton and Pinkard had not yet received their right-to-sue letters when they filed suit. Unquestionably, the action was subject to dismissal without prejudice at that time; however, our decision in Clanton v. Orleans Parish School Board makes clear that the subsequent receipt of the right-to-sue letter cures the defect with respect to the original filing of this action.

The fourth factor considered in Zipes v. Trans World Airlines, Inc., supra, is also satisfied in this case. Treating the requirement that a plaintiff receive statutory notice of the right to sue before filing a civil action as a condition precedent that may be satisfied by the receipt of a right-to-sue letter while an action is still pending furthers the remedial purposes of the act without undermining the particular purpose of that requirement, to give the EEOC an opportunity to fulfill its function of investigating the charge and attempting conciliation. A Title VII action filed prior to the receipt of statutory notice of the right to sue does not preclude the EEOC from performing its administrative functions, and it is unlikely that permitting the subsequent receipt of a right-to-sue letter to cure the filing defect will encourage plaintiffs to attempt to bypass the administrative process because premature suits are subject to a motion to dismiss at any time before notice of the right to sue is received. Such a dismissal would be without prejudice, and the plaintiff could bring a new action upon receipt of a right-to-sue letter. To distinguish such an action, once dismissed and then renewed, from an action where the defect is cured while the action remains pending is to distinguish between a glass half full and a glass half empty. Barring a Title VII plaintiff, who received his right-to-sue letter after filing suit, from ever pursuing his Title VII claim would not only be anomolous, but also would be an extreme sanction, contrary to the general policy of the law to find a way to prevent the loss of valuable rights, not because something was done too late, but rather because it was done too soon. Avery v.

Fischer, 360 F.2d 719, 723 (5th Cir. 1966). It would also contravene our well-established policy not to interpret Title VII's procedural requirements in a manner that bars substantive claims. "Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme, courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims under the Act." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 2 FEP Cases 788 (5th Cir. 1970). See Love v. Pullman Co., 404 U.S. 522, 527, 92 S.Ct. 616, 619, 30 L.Ed.2d 679, 4 FEP Cases 150 (1972).

In light of the forgoing, we conclude that the receipt of statutory notice of the right to sue is not a jurisdictional prerequisite, which if not satisfied deprives courts of subject matter jurisdiction; rather, the receipt of a right-to-sue letter is a condition precedent, which on proper occasion may be equitably modified. Here, we hold that the receipt of a right-to-sue letter subsequent to the commencement of a Title VII action, but while the action remains pending, satisfies the precondition that a plaintiff obtain statutory notice of the right to sue before filing a civil action under Title VII.

In this case, Pinkard and Lofton filed the Title VII suit as a class action four days after filing their complaint with the EEOC. Two months later, Holston, who had received a right-to-sue letter, was added as a named plaintiff. Since the complaint was framed as a class action, the jurisdictional prerequisites were arguably satisfied at that time. See Crawford v. United States Steel Corp., supra; Miller v. International Paper Co., supra. Except for the addition of Sealie, the case rested in this posture over two years until the district court denied class certification.[5] In the meantime, Pinkard and Lofton had

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[5] In it memorandum opinion denying class certification, the district court stated that "[w]hile it appears that there are absent as to plaintiffs Louis Pinkard and Edward Lofton allegations of charges having been filed with the Equal Employment Opportunity Commis-

received their right-to-sue letters. The reason given by the EEOC for issuing the letters was that this lawsuit was pending. Though the reason given was not one of the published conditions for which the EEOC issues right-to-sue letters, see 29 C.F.R. §§ 1601.19, 1601.28, the letters were nevertheless effective. Both letters explicitly stated that the EEOC had dismissed the charges and that issuance of the notice terminated administrative processing. Whether the EEOC was correct in dismissing the charges for the reason given is immaterial. Cf. Hefner v. New Orleans Public Service, Inc. 605 F.2d 893, 895-96, 21 FEP Cases 193 (5th Cir. 1979) (EEOC letter, which stated that the complainant's file had been administratively closed because the EEOC lacked jurisdiction to investigate the charge, was sufficient to trigger the ninety-day filing period whether or not the EEOC's conclusion was correct). Furthermore, more than 180 days had elapsed since Pinkard and Lofton first filed charges with the EEOC, and they had a right to obtain their statutory letters simply upon

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sion (EEOC) and of 'Notice of Right to Sue' letters having been issued, defendant admits their existence." Pinkard v. Pullman-Standard, 80 F.R.D. 287, 18 FEP Cases 723, 76-G-0026-S (N.D.Ala.) (filed Oct. 31, 1978). The memorandum opinion was filed less than 90 days after Pinkard and Lofton had received their right-to-sue letters. Assuming arguendo that receipt of the letters did not cure appellants' error in prematurely filing this civil action and that the court at that time had dismissed the suit, appellants Pinkard and Lofton could have refiled their Title VII action within the requisite 90 days after receipt of their right-to-sue letters. 42 U.S.C. § 2000e-5(f)(1). But by the time district court dismissed the appellants' Title VII claims some eight months later, the 90-day limitation period for filing suit had run, leaving the appellants barred by statute from refiling suit under Title VII. Our holding condoning the premature filing of Title VII actions, protects plaintiffs such as appellants from losing their right to sue under Title VII where either the defendant has been dilatory in moving for dismissal of the suit or the court fails to act on such a motion prior to the plaintiff's receipt of their right-to-sue letters.

request, regardless of further administrative processing. 42 U.S.C. § 2000e-5(f)(1). Because Pinkard and Lofton had received right-to-sue letters while this action was pending, we find that the district court erred in dismissing their Title VII claims for lack of subject matter jurisdiction.[6]

2. Circuit Judge Clark's Dissent On Jurisdiction

I dissent from the court's determination, in the immediate preceding section, that the receipt of a right-to-sue letter after suit has been filed cured the failure to exhaust administrative remedies. The issue is not one of jurisdiction as classified by the majority, but one of exhaustion of administrative remedies. As a condition precedent to suing an employer for unlawful discriminatory discharge, an employee must first seek relief through the EEOC mediation machinery. The majority is telling every employee in the circuit that this procedure is no longer necessary; merely file your EEOC claim first, then file your lawsuit the next week, and after the expiration of 180 days obtain a right-to-sue letter from the EEOC in which it can say mediation has been obviated by the pending lawsuit. Pinkard and Lofton filed suit in February 1976 and received their right-to-sue letters in August of that year. The EEOC took no action because of the lawsuit. Pinkard and Lofton did not give the administrative procedures an opportunity to be activated.

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[6] The dissent asserts that the majority condones and encourages the filing of Title VII claims without the receipt of a right-to-sue letter and that our holding will cause the EEOC to cease its mediation efforts when a suit is prematurely filed. The dissent misinterprets our holding. We do not in any way approve the filing of suit prior to the receipt of a right-to-sue letter. As we have noted a prematurely filed suit is subject to dismissal upon proper motion at any time prior to the receipt of statutory notice of the right to sue. Moreover, contrary to the implications of the dissent, the filing of a Title VII action simply does not require the EEOC to terminate its mediation efforts or issue a right-to-sue letter.

The majority approves of this by saying that a dismissal of the lawsuit would accomplish nothing because a lawsuit could be immediately refiled for the same claim. This is true because the statute permits filing suit if 180 days has expired. However, such leniency extended to Pinkard and Lofton now permits every every employee to simultaneously file with the EEOC and the court, and the EEOC will naturally defer to the courts. This is contrary to the statute and puts our blessing on such unauthorized procedures.

I agree that the district court had subject matter jurisdiction. That question has now been fully answered by the Supreme Court in Zipes v. Trans World Airlines, 455 U.S. ____, 102 S.Ct. 1127, 71 L.Ed.2d 234, 28 FEP Cases 1 (1982), as it had been the former Fifth Circuit in Coke v. General Adjustment Bureau, 640 F.2d 584, 25 FEP Cases 433 (5th Cir. 1981) (en banc). However, a district court must look to see whether a plaintiff has a plausible explanation for not having pursued the congressionally-mandated EEOC administrative procedures.[7]

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[7] The relevant portion of 42 U.S.C. § 2000e-5(f)(1) states:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such a notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Title VII requires a claimant to file his discrimination claim with the EEOC within 180 days of the incident giving rise to the claim. The EEOC then sets into motion the administrative machinery designed to reconcile the employee-employer dispute. If EEOC efforts fail, it issues to the employee a right-to-sue letter. The employee must then file suit within 90 days after the receipt of the letter. In order to prevent undue delays if the EEOC's mediation machinery is overloaded, an employee may obtain a right-to-sue letter and may sue the employer within 180 days after the filing of his EEOC claim. Any lawsuit filed before the receipt of the right-to-sue letter is premature and subject to dismissal.

The legislative history of Title VII is somewhat sparse. This is largely due to the fact that it was just part of the momentous Civil Rights Act of 1964. Other parts of that Act attracted more attention in Congress. However, the Title VII procedural requirements are clear on their face and nothing in the legislative history contradicts this facial intent. It is clear that Congress did not intend for every employee who had an allegation of employment discrimination to have a cause of action in federal court absent the pursuit of EEOC administrative remedies. Thus, the EEOC effectively stands at the door of the courthouse in the congressional scheme.

One factor that motivated Congress to construct Title VII administrative framework was the belief that voluntary compliance with Title VII's mandate was preferable to compelled compliance. Dent v. St. Louis-San Francisco Railway Company, 406 F.2d 399, 402, 1 FEP Cases 583, 70 LRRM 2284 (5th Cir. 1969); Stebbins v. Nationwide Mutual Insurance Company, 382 F.2d 267, 268, 1 FEP Cases 235, 66 LRRM 2133 (4th Cir. 1967). Thus, the EEOC was instituted to effectuate this desire.

Another powerful motivating factor in this scheme is the protection of the work load of the courts. If the administrative procedures which are conditions precedent to filing lawsuits are eliminated, the courts would sink under an intolerably

oppressive burden. Indeed, in 1975 for example, the EEOC had a backlog of over 120,000 charges (B. Schlei & P. Grossman, Employment Discrimination Law 769 (1975)). The EEOC, if fully given the chance to operate, may solve many employer-employee disputes through mediation. Thus, many potential lawsuits and the resulting court congestion may be avoided by giving the EEOC an opportunity to perform its statutorily-mandated function. The procedural formalities of Title VII should be respected for this reason.

The court's ruling today on this issue will have major adverse consequences. No plaintiff now need wait for the EEOC to mediate his claims with the employer before filing suit in the district court. Rather, in an attempt to get to trial earlier, plaintiffs will file complaints with the EEOC and the district court simultaneously. The EEOC, as in the instant case, may issue a right-to-sue letter simply because suit has already been filed in the district court. Thus, by holding that the receipt by Pinkard and Lofton of right-to-sue letters from the EEOC *after* their filing suit cures the procedural defect, the court invites abuse from Title VII plaintiffs.

Lofton and Pinkard wanted to sue under Title VII without pursuing their EEOC remedies. They filed their EEOC claims and promptly filed their lawsuits, *after* which they received their right-to-sue letters. Indeed, the reason the EEOC issued the right-to-sue letters was because *this lawsuit was already pending in the district court*. Thus, Pinkard and Lofton did not give the EEOC a chance to reconcile their differences with Pullman. This may well impose a significant burden upon the courts and it frustrates the congressional scheme. This situation should not be allowed to come to pass.

Requiring exhaustion of administrative remedies, unless there is some equitable reason for not doing so, is in accord with Gibson v. Kroger Co., 506 F.2d 647, 8 FEP Cases 1286 (7th Cir.), cert. denied, 421 U.S. 914, 95 S.Ct. 1571, 43 L.Ed.2d 779, 12 FEP Cases 555 (1975). However, this position is not inconsistent with such cases as Henderson v. Eastern Freight

Ways, Inc., 460 F.2d 258, 4 FEP Cases 726 (4th Cir.), cert. denied, 410 U.S. 912, 93 S.Ct. 976, 35 L.Ed.2d 275, 5 FEP Cases 1224 (1972) and Clanton v. Orleans Parish School Board, 649 F.2d 1084, 26 FEP Cases 740 (5th Cir. 1981). Equitable considerations can validate a right-to-sue letter received after suit has been filed or even eliminate the necessity of obtaining one.

In Henderson, supra, relied upon by the majority, for example, the Fourth Circuit was confronted with a bizarre factual situation which mandated a finding for the plaintiff. The plaintiff there filed three charges at various times with the EEOC. The first charge was filed against the employer, the second was filed against the employer and the union, and the third was filed against the union. A copy of the second charge was submitted with the third charge. The first charge was dismissed by the EEOC with the plaintiff taking no action on it. The Commission issued a right-to-sue letter on the third charge in May 1969. The second charge followed "an erratic course" in the bureaucracy, "bobbing back and forth" until a right-to-sue letter was issued in early 1970. The plaintiff filed suit in August 1969 on charges two and three. It was unclear whether the right-to-sue letter issued in May 1969 covered charge two. Although the EEOC subsequently determined that it did not and issued another right-to-sue letter, the court of appeals ruled that the right-to-sue letter issued in 1970 cured any problem the plaintiff had with filing suit on charge two in 1969. Given the equities of that situation, the holding was clearly proper.

Although relied upon by the majority, Clanton v. Orleans Parish School Board, 649 F.2d 1084, 1095, 26 FEP Cases 740 (5th Cir. 1981), is in no manner similar on its facts or supportive of the majority's opinion. In that case, the EEOC, rather than the Attorney General, as arguably required by 42 U.S.C. § 2000e-5(f)(1), issued the right-to-sue letter. The panel held that a subsequent right-to-sue letter issued by the Attorney General rectified the situation, assuming *arguendo*, that the

Attorney General and not the EEOC was required to issue the right-to-sue letter.

This court in Crawford v. United States Steel Corp., 660 F.2d 663, 27 FEP Cases 1084 (5th Cir. 1981), was also confronted with equitable factors which mandated a holding that when several men have claims of similar discriminatory treatment at the hands of an employer, only one of them must file with the EEOC. Crawford arose out of the protracted and bitter litigation involving the employment practices of U.S. Steel at its Fairfield, Alabama plant. Originally, twenty-one black employees, most of whom had complied with all the Title VII requirements, filed suit against U.S. Steel. All of these plaintiffs had been eligible for backpay tenders under the nationwide steel industry consent decree approved in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 11 FEP Cases 167 (5th Cir. 1975) and were also members of the so-called "new Ford class" that first made its appearance in this circuit in United States v. United States Steel, 520 F.2d 1043, 11 FEP Cases 553 (5th Cir. 1976). However, the plaintiffs were dissatisfied with the relief offered them in Allegheny-Ludlum, which prompted them to file suit. Before the commencement of discovery the plaintiffs sought leave to amend their complaint to allege a class action. The district court denied this motion and also granted summary judgment against seven of the twenty-one plaintiffs because they had not followed the proper EEOC procedures prior to filing suit. This court affirmed the district court's denial of class certification but reversed the summary judgment against the seven plaintiffs who had not filed EEOC complaints.

The panel in Crawford announced that the claims of the seven plaintiffs who failed to file the EEOC charges were substantially similar to the fourteen who followed the proper procedures. All claimed that they were given improper seniority dates, passed over for promotion, and denied adequate union representation. Further, the court stated that the purpose of the filing requirement was not served by requiring each

plaintiff to file essentially identical charges. The mediation channels were already filled with claims substantially similar to the seven in question. Given the fact that the claims were virtually identical, the existence of the consent decree, and that nothing could be achieved through the administrative process, compelling reasons existed for waiving the formal requirements of Title VII actions.

In Clanton, Henderson, and Crawford, equitable factors were present which required a setting aside of the strict procedural requirements of Title VII. In Clanton, as in Henderson, an unusual factual situation brought about by the government's mishandled paperwork existed. In both cases, plaintiffs who in good faith attempted to comply with the EEOC requirements would have found their access to the courts barred through the fault of the government. Neither court could allow that scenario to come to pass. There are no such equities in the instant case. Instead of good faith, there is bad faith on the part of Pinkard and Lofton.

In Crawford, claims were so similar and the possibility of settlement was so unlikely, it would clearly have been unreasonable to force each individual plaintiff to rigidly comply with Title VII's requirements. Again, we have no such equities present here. All that Pinkard and Lofton have in common with Sealie and Holston (or, indeed, with each other) is that they are black and that they were fired by Pullman. Each of the four disputes were quite distinct and arose from very different factual situations. Therefore, Crawford too is inapposite.

Pinkard and Lofton ignored the statutorily-mandated EEOC procedures with no justification. Thus, the subsequent issuance of the right-to-sue letters did not cure the failure to exhaust as mandated by Congress.

Lastly, I note in passing that the fourth factor considered by the Supreme Court in Zipes v. Trans World Airlines, supra, is not satisfied in this case. The EEOC did not fulfill its function of investigating the employee's charge and attempting conciliation in the instant case. Rather, it simply issued a right-to-sue

letter because the action was already pending in the district court. Thus, the statutorily-mandated procedures have been ignored both in form and in substance in the instant case.

For the above reasons, I am unable to accept the court's opinion on this issue. Therefore, I dissent.

B. Merits Of The Title VII Claims

1. Circuit Judge Kravitch

The district court held that none of the plaintiffs proved that they were discriminatorily discharged in violation of Title VII. I agree with the district court's disposition of the Title VII claims raised by plaintiffs Sealie, Holston, and Lofton for the reasons discussed in Part III of this opinion. Similarly, I would affirm the district court's finding that Pinkard failed to establish that he was the victim of racial discrimination in violation of 42 U.S.C. § 2000e-2,[8] however, for the same reasons for which we reverse the district court's denial of Pinkard's § 1981 claim, Part III infra, the record compels the conclusion that Pullman-Standard Co. discharged Pinkard in retaliation for his opposition to unlawful employment practices in violation of 42 U.S.C. § 2000e3,[9] and accordingly I would reverse the district court's disposition of Pinkard's Title VII claim raised under that section.

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[8] 42 U.S.C. § 2000e-2 states in pertinent part:

> (a) It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, with respect to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

[9] 42 U.S.C. § 2000e-3 states in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,

2. Circuit Judge Clark

As noted above, I do not believe that the Title VII claims of Pinkard and Lofton were properly before the district court. Therefore, I do not believe that they are entitled to a recovery.

3. District Judge Lynne

The logical analysis of the jurisdictional issue, authored by Judge Kravitch, is unanswerable. In concurring therewith, I add by way of emphasis that what we review is the court's conclusion that "it lacks jurisdiction over the claims of plaintiffs Pinkard and Lofton relating to Title VII," for the reason that neither had received a right-to-sue letter before filing his complaint. That the court erred is made crystal clear by Zipes v. Trans World Airlines, Inc., 455 U.S. ____, 102 S.Ct. 1127, 71 L.Ed.2d 234, 28 FEP Cases 1 (1982). If filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, it follows ineluctably that neither is the issuance of a letter which is triggered only by the filing of such a charge. I cannot agree that the doctrine of exhaustion of administrative remedies is apposite to the issue before us. It is noteworthy that in Zipes the Supreme Court did not bow in its direction in holding that the district court had authority to award relief.

Notwithstanding our holding that the district court erred in its determination that it lacked jurisdiction over the Title VII claims, I would affirm for the reason that the discharges complained of were expressly found by the court to have been for a legitimate, non-pretextual reason, a defense equally available

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to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

to a claim of discriminatory discharge posited either upon 42 U.S.C. § 2000e-3(a) or 42 U.S.C. § 1981. In my opinion that finding was not clearly erroneous.

4. Conclusion

Because the majority of the panel, although for different reasons, would deny the Title VII claims, the district court's disposition of these claims is affirmed.

IV. The § 1981 Claims

We now turn to whether the trial court erred in concluding that the plaintiffs failed to establish a case of racial discrimination under 42 U.S.C. § 1981.[10] In this circuit, it is well settled that "Section 1981 is a parallel remedy against discrimination which may derive its legal principles from Title VII."[11] Therefore, in considering the merits of this appeal, we apply the now familiar McDonnell Douglas guidelines, as interpreted in Texas Dept. of Community Affairs v. Burdine,[12] for proving racial discrimination.[13] Plaintiff must first establish the prima facie elements of a discriminatory discharge. The defendant

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[10] 42 U.S.C. § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

[11] Blum v. Gulf Oil Corp., 597 F.2d 936, 938, 20 FEP Cases 108 (5th cir. 1979), and see Garcia v. Gloor, 609 F.2d 156, 164, 21 FEP Cases 884 (5th cir. 1980).

[12] 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207, 25 FEP Cases 113 (1981).

[13] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, 5 FEP Cases 965 (1973).

then has the burden of coming forward with a legitimate nondiscriminatory reason for its actions, after which the burden shifts back to the plaintiff to prove that the employer's stated justification is pretextual.

A. Pinkard's Claims

1. Circuit Judge Clark With Circuit Judge Kravitch, Concurring

Louis Pinkard was hired by Pullman-Standard in July 1962. He was assigned initially to the steel erection department as a freight assembler, a department which was 98% black with the sole exception of the riveter and foreman, who were white. For eight years, from 1962 until 1970, when Pinkard became a shop steward, Pinkard was a responsible and competent employee. Pinkard's disciplinary record during that time was exemplary. For over eight years he was never reprimanded, warned, or disciplined for any of his work-related or union activities. Neither did he initiate, nor participate in, the filing of any grievances.

The appellant began to rise through the ranks of union leadership in 1970. He first became a union shop steward, and then in August 1971, Pinkard was elevated to the position of foreman over the company's newly created night shift. The appellant held that position from August until November, and it was about this time that the relationship between Pinkard and the company began to change.

The first sign of conflict between the parties occurred in June 1971 and involved the circulation of a petition to change the number of cars which were produced on the production lineup within a given day. The union had authority, under the contract, to permit grievance committeemen to file such grievances, although Pinkard was at that time only a shop steward. The incident is significant because it demonstrated the nature of Pinkard's shifting relationship with the company.

The petition was initiated at a union meeting at the local union hall. That afternoon Pinkard and several other employees took the petition over to the home of Perry Thompson, President of the Local, who was ill at the time. As Pinkard testified:

> He [Thompson] was ill at the time and he advised me that I should take this list and go in the plant the next morning at work and seek as many signatures as I could to present to the other grievance committeemen . . .

Record, vol. 3, at 390.

After successfully gathering an impressive list of signatures the next day, Pinkard was called to James Hudson's office, Director of Industrial Relations for the company, and told that he was in violation of the contract prohibiting solicitation of signatures during company time. While the evidence regarding whether Pinkard actually solicited signatures during work time was conflicting, Pinkard was nonetheless informed "that this would be placed on his record." Id. at 391.

In June 1973, Pinkard was elevated to the position of grievance committeeman. Pinkard was the sole black committeeman among six. From this time forward the relationship between the appellant and the company became increasingly strained. During the three years between 1973 and 1976, Pinkard championed minority and union rights and filed numerous grievances alleging racial discrimination in various aspects of the company's operations. Although the court below found that some of these grievances "were frivolous," the court also found that "many were not."

In 1974, one year after becoming a grievance committteeman, Pinkard became involved in a major employment discrimination lawsuit against Pullman-Standard alleging that the company's departmental seniority system perpetuated the effects of past discrimination. That lawsuit culminated in Swint v. Pullman-Standard, 539 F.2d 77, 13 FEP Case 604 (5th Cir. 1976), after remand, 624 F.2d 525, 23 FEP Cases 748 (5th Cir. 1980), rev'd. and remanded, 456 U.S. ____, 102 S.Ct. 1781, 72 L.Ed.2d ____, 28 FEP Cases 1073 (1982).

Throughout the Swint litigation, Pinkard assumed a major role. He attended each of the sixteen days of trial, sat at counsel table, and assisted counsel in preparing for trial. He served a subpoena on at least one company official and was in every respect a highly visible and vocal participant throughout the proceedings. Everything in the record suggests that Pinkard was a major, if not the primary, force behind the litigation. The Swint case proceeded to trial, and the trial court ruled in favor of the company. Although Swint was reversed on appeal in this court, between the issuance of the district court opinion and the appellate court's reversal, Pinkard was fired.

In cannot be doubted that Pinkard's participation in the Swint trial further exacerbated the relationship between Pinkard and the company. The increased strain can readily be evidenced by a November 8, 1974 grievance which Pinkard filed against the company. In that grievance, Pinkard alleged that:

> For some time now I have had the feeling that there is a conspiracy at the company to fire me. Is it because I filed charges at EEOC against the company? Is it because I testified in Federal Court against the company?
>
> * * *
>
> Two of the company representatives have made statements to Larry McCullough that they were going to fire me.

Record, vol. 3, at 573.

The grievance was investigated by the company, resulting in the release to Pinkard of his complete employment and disciplinary records. The company, however, concluded that "[t]here is no conspiracy on the part of the company to discharge Louis Pinkard." Id. Although this court draws no conclusions regarding the existence or nonexistence of the alleged conspiracy, we do consider this grievance, following immediately on the heels of the Swint trial, to be a significant indicator of the charged atmosphere that existed on February 4, 1976, the day Pinkard's alleged "insubordination" prompted the company to discharge appellant.

The incidents for which Pinkard was discharged occurred on February 4, 1976. We focus primarily on the events which occurred that day despite management's contention that prior incidents, including the petition circulation incident described above, contributed to their decision to discharge appellant. We do not consider the 1971 petition circulation or the alleged 1974 work stoppage to have been major contributing factors to Pinkard's discharge, and accordingly, we focus our attentions on the events of February 4.

The incident which precipitated Pinkard's discharge involved insubordination toward a black foreman, Dave Mason. On February 4, shortly after arriving for work, Pinkard was approached by Neal Bell, a shop steward, and was asked to handle a written warning directed at an employee. On a previous occasion, Pinkard had orally reprimanded this employee for tardiness, and the written warning which Pinkard had been requested to give him concerned the identical incidents for which the employee had been orally reprimanded.

Based on this request, it was Pinkard's opinion that the employee was being subjected to disciplinary "double jeopardy," prompting Pinkard to ask the foreman, "Mr. Mason, how about you, Mr. Moss [Plant Manager] and myself and [the employee] having a little meeting to discuss this, because, we are supposed to have already settled it." Record, vol. 3, at 410. Although Mason stated that he believed such a meeting would serve no purpose, Pinkard requested that Mason find a relief man so that Pinkard could leave his assigned work area in order to resolve the matter, and Mason granted the request.

Pinkard and Mason then went to James Moss' office (the plant manager) to discuss the matter. Conflicting testimony was given as to what next transpired. According to both Pinkard and Mason, when the two men entered the room, Moss and another foreman were present, and Moss was in the process of writing the company's daily work reports at his desk. Pinkard said "good morning," but Moss and the other foreman continued their paperwork. Although Mason's testimony corroborated Pinkard's testimony, the two men differed slightly as to

the amount of time Pinkard was left standing in the office. As Pinkard testified:

> Neither man spoke. A few minutes later Dave said, "Okay, Mr. Pinkard, go ahead with your complaint." I said "Well, they won't talk. They won't speak. They might not talk," just like that. Well, Moss whirled around in his chair and said, "Do you want to make something out of it?"

Record, vol. 3, at 410.

Mason's description of the incident correlates substantially with Pinkard's, except that Mason did not mention Moss' alleged retort to Pinkard. As Mason testified:

> I don't know whether it was several minutes or not, but they kept working on their paper.
>
> Q. [by counsel] Nobody was saying anything during that time?
>
> A. Mr. Pinkard was talking to me. He said, "These people don't seem like they want to speak. I just as soon go to the front office."

Record, vol. 4, at 901.

Moss's testimony is only slightly different from Mason's and Pinkard's, although it permits inferences somewhat more favorable to the company. As Moss testified:

> So, I looked up and spoke to Mr. Pinkard when he came in the door. I just went on filling my report out—I don't know, a matter of two or three minutes. Mr. Pinkard said, "These people don't even want to talk to me. I just as well to go down to the main office."

By Pinkard's reference to the "front office," Pinkard had expressed his desire to go to the company's central office in order to press further his claim for a meeting at which the disciplined employee could be personally present to discuss the written warning. When Moss refused both of Pinkard's requests, Pinkard asked if he could obtain a witness who could testify that management had refused to allow Pinkard to seek out the plant manager.

At this point the testimony becomes even more conflicting. Mason and Moss both testified that Mason ordered Pinkard to return to work. Pinkard denied this. The district court found that the evidence as to whether Mason had so directed was conflicting, and therefore refused to base its decision upon Pinkard's alleged refusal to obey an order to return to work.

Pinkard then left Moss' office and tried to locate Neal Bell, a shop steward. Upon discovering that Bell had left his regular work station, Pinkard returned to his job and found Mason and Bell waiting for him. Approximately fifteen minutes had elapsed. Mason then stated to Pinkard that he had told Pinkard to report back to his job. Pinkard replied that Mason had not told him to return to the job, and when Mason insisted that he had so directed Pinkard, Pinkard stated, "Dave, you are lying. You didn't tell me that." Mason replied, "I have got two witnesses that heard me tell you that." Pinkard responded, "Dave, your two witnesses would be lying." Record, vol. 3, at 411. Mason then informed Pinkard that he should accompany Mason to the industrial relations assistant's office. Pinkard refused to come to the meeting. Mason then told him, "well, you go back and go on your job," which Pinkard did. Mason then reported back to plant management, telling them that Pinkard had refused to attend the meeting. At that point the industrial relations management decided to conduct a full investigation in order to determine whether Pinkard should be disciplined for insubordination.

During the next eight days, Pullman conducted its investigation, talked with each witness and employee involved, and worked in fulll cooperation with its highest level of industrial relations management in Chicago. The result was a letter issued on February 12, 1976, which had been prepared by the industrial relations department and signed by Moss. The letter stated:

> After careful consideration of your conduct of last week, the Company has concluded that you have been guilty of serious misconduct, including acts of insubordination to Track Foreman Dave Mason. You have been repeatedly

> warned and continued in the past to follow the contractual grievance procedure in the handling of your own complaints or those of other employees . . . . Based on these matters and a careful review of your entire disciplinary and work record, we have decided to discharge you effective immediately upon your receipt of this notice.[14]

As soon as Pinkard was discharged, the company and management experienced an immediate lessening in tension. There can be no question that all the parties involved, with the possible exception of Pinkard, were relieved. A few excerpts from the testimony will convey this. James Moss testified, for example, that prior to Pinkard's discharge he had received approximately thirty-one grievances during the past year, but that "[a]fter he [Pinkard] left it was just like a different place to work. There wasn't no grievances." Record, vol. 4, at 848. Similarly, Dave Mason testified that, "after Mr. Pinkard got fire, everything went nice out there. You didn't have that kind of trouble. It was a whole lot better place to work." Id. at 898.

The trial court held that the plaintiff "gave the defendant ample justification for his discharge . . . and the court nothing to substantiate his charge of racial discrimination." The court relied upon two grounds in so holding, appellant's abuse of the contractual grievance procedures and his insubordination.

[4] Turning first to appellant's alleged abuse of the contractual grievance procedures, our own consideration of the transcript leads this court to find that the trial court's con-

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[14] In evaluating management's response to the events of February 4, we note that no Pullman employee previously had been discharged for calling his foreman "a liar." Although the facts surrounding other name-calling incidents were less extreme than those involved in the instant case, we nevertheless acknowledge that A. L. Hulsey, a white union official, testified that he had heard other employees tell foremen that they were lying "many times." Hulsey also testified that he had said to his foreman, "Well, Hog Jaw, you are lying there. So and so just told me different." (Record, vol. 2, at 86.)

clusion was clearly erroneous. It is true that the record demonstrates that Pinkard frequently engaged in methods of grievance resolution not specifically set forth in the collective bargaining agreement. The company contends, therefore, that Pinkard abused the contractual procedures, pointing specifically to Pinkard's efforts to secure an "extra-contractual" meeting on February 4. But the testimony of Pullman's own witness and the Director of Industrial Relations, James R. Hudson, reveals that informal resolution of grievances was frequently a preferred method of handling grievances, to the extent that informal meetings such as that requested by Pinkard were not without precedent at the Bessemer plant. When questioned by counsel, Hudson testified:

> Q: Is there a precedent for such a meeting?
>
> A: There have been times when the grievance committeeman would discuss matters with the department heads or people above the A level foreman at the plant, depending upon the circumstances.
>
> Q: And there have also been times when the grievance committeeman would discuss particular grievances with persons in your office in Industrial Relations prior to the filing of a written grievance, haven't they?
>
> A: Yes. There have been times when that has occurred.

Record, vol. 1, at 159.

The company contends alternatively that Pinkard abused the contractual grievance procedures by filing too many grievances. These grievances of which the company kept track because they were submitted in writing and formally processed. We think it illogical for the company to complain on the one hand of appellant's failure to file written grievances and on the other of appellant's overuse of the formal grievance procedures. Moreover, the district court specifically found:

> The evidence established that the plaintiff did take an active role as committeeman, and filed more grievances than his predecessors. Some were frivolous, many were

not. This is insufficient cause, as the arbitrator ruled, to support discharge.

Having considered the evidence, we are finally persuaded by the testimony of Pullman's Plant Manger for Labor Relations, J. Fred Hull, that neither the Union nor the management was entirely clear as to what constituted accepatable or unacceptable grievance resolution. We reach the inescapable conclusion that no *one* procedure was consistently adhered to. Hull himself admitted that after he "told Mr. Pinkard to follow the grievance procedure," he also told Pinkard "that certainly I would be glad to talk with him . . . ." Hull then testified:

> Q: [By counsel for appellant] Now, does Pullman encourage the filing of written grievances as opposed to an attempted disposition of disputes by informal means?
>
> A: Well, I don't know that I can give you a pinpoint answer . . . . We have—certainly, we have a lot of grievances that are filed . . . . I try not to tell people to "file a grievance." I seldom have the opportunity to make that statement either way:

Record, vol. 3, at 551-52.

When Pinkard's actions as grievance committeeman are considered in light of this testimony, the trial court's conclusion that plaintiff abused the contractual grievance procedures cannot be upheld, as it is clearly erroneous. While Pinkard might have employed greater tact in his duties as committeeman, it is clear to this court that plaintiff did not abuse the grievance procedures as they were in practice at the Bessemer, Alabama plant.

Having so held, we are left with the trial court's alternative holding that plaintiff's discharge was justifiable because of his insubordination. As the trial court put it, Pinkard's discharge was justified by the "unprovoked malevolence" which plaintiff displayed toward Dave Mason, and because of "Pinkard's loud refusal to go to the meeting Mason sought him to attend." The trial court concluded that Pinkard had more than demonstrated his "disdain for management" by his conduct on February 4, and consequently was properly discharged.

While the evidence revealed mutual antagonism between the parties, the decision in the case must not turn on such subjective factors as "unprovoked malevolence" and "disdain for management." Instead, the decision must turn on the facts indicating the employer's basis for the discharge. Was it for "insubordination" as contended by the employer, or was it because of Pinkard's efforts to represent the black employees of the plant as a union representative and a black activist? In evaluating plaintiff's claim of discriminatory treatment for his espousal of black employees' rights, the court found that "plaintiff's claim to have been discharged for racial prejudice resulting from these activities was unsupported by anything more than his own accusations." We find this clearly erroneous. We have reviewed all of the testimony carefully. The evidence, largely uncontradicted, clearly demonstrates that the discharge of Pinkard would never have occurred but for his union and racial activism. As mentioned, other similar incidents have been met by the employer with reprimands, and never with discharge.

The trial court made further reference to judicial proceedings which were entirely distinct from the instant action, stating:

> The court takes not of plaintiff's other involvement in the courts of this district. In Calvin E. Parker, et al. v. Local Union No. 1466, United Steelworkers of America, AFL-CIO; Leonard Lewis; Louis Pinkard; and Arvil Hulsey, Civil Action No. 76-M-1450-S (N.D.Ala., filed March 15, 1979), the plaintiff was held liable for damages for his actions as vice-president of the Local. There, at a time since his discharge, plaintiff was found to have unlawfully interfered with the rights of Pullman employees.

The court's reference to an independent judicial proceeding, combined with its description of the Mason incident as a "venomous retort by a man whose resentment still showed through at trial," leads this court to the conclusion that the trial court improperly focused on plaintiff's antagonism without counterbalancing the defendant's own antagonism.

This court does not condone Pinkard's action in calling Mason a liar or question management's right to punish such behavior. The question we are faced with, however, is whether Pinkard's discharge was the proper punishment or whether, as appellant contends, his discharge was an overly severe penalty tainted to an impermissible degree by Pinkard's lawful advocacy of minority and union rights. The evidence clearly shows that it was the latter.[15]

In summary, we reverse the trial court's judgment pursuant to the standards set out in FRCP 52 because the court was clearly erroneous in finding that the company discharged Pinkard because of his abuse of contractual procedures and because of his insubordination. The oft-stated definitive test is as follows:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). The district court's findings are against the clear weight of the evidence. Credibility of witnes-

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[15] A claim under § 1981 may be based upon retaliatory action taken against an employee for the employee's lawful advocacy of the rights of racial minorities. See Setser v. Novack Inv. Co., 638 F.3d 1137, 24 FEP Cases 1793 (8th Cir. 1981) (retaliatory action against prospective employee for filing a complaint with the EEOC alleging pracial discrmination presents a § 1981 claim); Winston v. Lear Siegler, 558 F.2d 1266, 15 FEP Cases 306 (6th Cir. 1977) (a white party fired for protesting an asserted racially motivated firing of a non-white party may sue under § 1981); Caldwell v. National Brewing Co., 443 F.2d 1044, 3 FEP Cases 600 (5th Cir. 1971), cert. denied, 405 U.S. 916, 92 S.Ct. 931, 30 L.Ed.2d 785, 4 FEP Cases 324 (1972) (a plaintiff alleging that he was discharged because he complained about racially discriminating employment practices may intentionally bypass the EEOC and seek relief under § 1981).

ses is not an issue because there is no significant conflict in the evidence. Instead, this court is left with the definite and firm conviction that a mistake has been committed when both of the company's principal witnesses, Mr. Hudson and Mr. Hull, made it clear that the company did not object to informal resolution of grievance matters, and the evidence reflects that no employee had been discharged for insubordination for conduct committed very similar to that of Pinkard, which conduct occurred on February 4, 1976.

Nothing in the recent opinion of Pullman-Standard v. Swint, 456 U.S. ___ S.Ct. 1781, 72 L.Ed.2d—, 28 FEP Cases 1073 (1982), affects this case. There the Court found that our court had erred in (1) resolving in the first instance a factual dispute which had not been considered by the district court and (2) failing to remand where findings are infirm because of an erroneous view of the law and the record permits two or more resolutions of the factual issue. Hence, we reverse the trial court and remand the case for a determination of damages.

2. District Judge Lynne's Dissent

In Swint v. Pullman-Standard, 539 F.2d 77, 105, 13 FEP Cases 604 (5th Cir. 1976), the Court held: "Insubordination, the principal reason given for the discharge . . . was more than amply justified." Judge Guin's finding of ultimate fact with respect to Pinkard's claim of discriminatory discharge was: "The inevitable conclusion is that plaintiff was in fact insubordinate, and that his insubordination was egregious, and that management thereby had a legitimate reason to terminate him. No prima facie showing of discrimination could be found, because no disparity in treatment was established."

While the court correctly states the controlling clearly erroneous standard of Rule 52(a), F.R.C.P., its conclusion that Pinkard's discharge was motivated in part by his lawful advocacy of minority rights is the product of the court's improper independent consideration of the totality of the circumstances found in the record. That is precisely the historical practice of the former Fifth Circuit condemned by the Su-

preme Court in Pullman-Standard v. Swint, 456 U.S. ____, 102 S.Ct. 1781, 72 L.Ed.2d ____, 28 FEP Cases 1073 (1982).

Acknowledging tangentially that independent review of the record reveals that Pinkard was insubordinate, the Court demurs to the severity of the sanction of discharge as though insubordination may easily be quantified. It there upon proceeds to resolve conflicts in the record evidence, to draw its own inferences and to make credibility choices in concluding that underlying the discharge there must have been a mixed motive and that the lower court's finding of a legitimate, non-pretextual discharge was clearly erroneous.

Admittedly there is substantial evidence in the record which, if credited, would have supported a finding by the District Court that Pinkard would not have been terminated for insubordination absent his aggressive espousal of the rights of minority employees. However, such a finding was not made. On the contrary, implicit in its finding of ultimate fact is the conclusion that the reason given for his discharge was not pretextual to mask retaliation for his advocacy of minority rights.

In concluding that the District Court's finding that the company discharged Pinkard because of his insubordination was clearly erroneous in that it was "against the clear weight of the evidence," ante slip op. at 15336, at p. ____, the court oversteps the bounds of appellate authority. Just the other day, in a followup to Swint, supra, the Supreme Court admonished:

> By rejecting the District Court's findings simply because it would have given more weight to [certain evidence] than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact . . . . An Appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed in-

nocent." United States v. Real Estate Boards, 339 U.S. 485, 495 [70 S.Ct. 711, 717, 94 L.Ed. 1007] (1950).

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., ___ U.S. ___, ___, 102 S.Ct. 2182, 2190, 72 L.Ed.2d—(1982).

To put the matter bluntly, the Court has substituted its own finding of ultimate fact for that of the District Court by rehearsing subsidiary facts to suit its purpose without a critical examination of the abundant record evidence which undercuts its conclusion.

I would affirm, and therefore I respectfully dissent.

B. Holston's Claims

The trial court found that Richard Holston was discharged because of his extremely poor work record, and the evidence supports this finding. Between February 21, 1974, when Holston was hired, and July 24, 1975, when Holston was discharged, appellant was continually disciplined by the company because of his poor performance. Four months after he was hired he received a written warning for bad work. Two weeks later he was given a second warning, which, although later rescinded, was followed by a three-day suspension on August 24, 1974. On March 13, 1975, Holston was given a written warning for being absent from his work station during company time. Significantly, appellant filed no grievances for any of these disciplinary actions. Given his extremely unsatisfactory performance, the trial court was correct in concluding that the company was justified in discharging Holston on July 24, 1975, when Holston failed to follow the direct orders of his foreman Franklin Rodriguez.

C. Lofton's Claims

We also affirm the trial court's determination that Edward Lofton failed to establish a prima facie showing that his discharge was motivated by racial discrimination or was in retaliation to his claimed unlawful employee practices. Lofton, who passed out handbills advocating a work slowdown during

company time, was properly discharged for violation of the contract. Furthermore, we have read Lofton's record testimony and agree that appellant's testimony was vague and evasive. The trial court found that "plaintiff Lofton [is] a witness of dubious credibility," and we agree that Lofton's insistence that he could not read, in sharp contrast to a successful tenure as shop steward responsible for the filing of numerous grievances, supports the trial court's determination. Consequently, we affirm the court's dismissal of Lofton's claim under 42 U.S.C. § 1981.

D. Sealie's Claims

Finally, we affirm the trial court's dismissal of plaintiff Donnie Sealie's Title VII and § 1981 claims. Donnie Sealie was discharged on January 10, 1975, one year after he was hired, for failure to follow the instructions of his foreman, Ed Hamaker and for his previous disciplinary record with the company. In December 1974, Sealie had received a written warning for tardiness and for "jumping shifts," that is, reporting for a different shift from the one assigned. On the day of Sealie's discharge, plaintiff was operating his welding equipment in such a manner as to throw sparks on two other welders, in contravention of a plant rule. When asked to alter his actions so that the sparks would not continue to fall upon the two men, Sealie adamantly refused. After a conference between appellant and the plant's labor relations assistant, during which the appellant persisted in his refusal, Sealie was discharged. The trial court held that Sealie's reliance upon the fact that he was black and his foreman was white was insufficient to establish a prima facie showing of discrimination, and we agree. Sealie's actions demonstrated an unwillingness to cooperate with management. No racial discrimination was proved; consequently, we affirm.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX D

CIVIL RIGHTS ACTS OF 1866

Sec. 1981 Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

No. 82-733

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PULLMAN STANDARD, INCORPORATED,

Petitioners,

v.

LOUIS PINKARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly conclude that the district court had clearly erred in rejecting respondent Pinkard's claim that his dismissal was the result of unlawful discrimination?

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No. 82-733

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

==========

PULLMAN STANDARD, INCORPORATED,

Petitioners,

v.

LOUIS PINKARD,

Respondent.

==========

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

==========

RESPONDENT'S BRIEF IN OPPOSITION

==========

The respondent Louis Pinkard, plaintiff in the proceedings below, respectfully urges that this Court deny the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

This case presents a routine and proper application of the requirement of

Rule 52, Federal Rules of Civil Procedure, that an appellate court reverse a factual finding which it finds to be "clearly erroneous." The trial court rejected on the merits eight discrimination claims of the four different plaintiffs.[1/] The court of appeals upheld the rejection of seven of these claims, affirming them on the ground that the lower court decision was not clearly erroneous.[2/] The Eleventh Circuit reversed only a single decision of the trial court, holding that the record compelled the conclusion that Pinkard had been dismissed in retaliation for his efforts to eliminate racial discrimination

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1/ The court rejected the Title VII and section 1981 claims of each of the four named plaintiffs. App. 8a-21a.

2/ App. 73a-74a, 89a-90a.

at Pullman Standard's Birmingham plant.[3/]

Petitioner does not, of course, attack the court of appeals' decision affirming seven of the eight trial court decisions in its favor. Neither does petitioner contend that, in upholding those lower court findings, the Eleventh Circuit applied any improper legal standard. It asserts, however, that the appellate court erred in refusing to uphold as well the rejection of Pinkard's retaliation claim.

It is clear that the court of appeals understood that a trial judge's factual findings must be upheld unless "clearly erroneous." The opinion below referred on six separate occasions to that Rule 52 standard.[4/] The court of appeals quoted

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3/ App. 76a-87a.

4/ App. 75a, 83a, 84a, 85a, 86a (two references).

and expressly relied on this Court's decision in United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948), that

> [a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. 5/

The appellate court found to be clearly erroneous both the trial court's ultimate conclusion that Pinkard had been dismissed for legitimate reasons 6/ and the subsidiary findings on which that conclusion was based. 7/

Petitioner contends that certiorari should be granted on the assumption that the court of appeals established and

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5/ App. 86a.

6/ App. 86a.

7/ App. 83a-85a.

applied a very different standard, one permitting appellate courts to engage in "independing fact finding".[8] Petitioner, however, points to no passage in the opinion below announcing or utilizing any such standard. All members of the court of appeals panel were well aware of this Court's decision in Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982),[9] which expressly rejected the proposition that appellate courts could engage in "independent fact finding" as to "ultimate facts". Petitioner's assertion that that erroneous standard was applied here is based solely on the content of a law review article written by Judge Godbold[10] which, in peti-

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8/ Petition, pp. 5, 14.

9/ App. 87a-88a.

10/ Petition, pp. 14-15 note 11.

tioner's view, advocates such an error. Judge Godbold, however, was not a member of the panel which decided this case, and there is nothing in the opinion below to suggest that any member of that panel had ever read the article in question.

The court of appeals' application of the clearly erroneous rule to the particular facts of this case presents no issues warranting review by this Court. This proceeding is not a class action;[11/] only a single black employee will be effected. The plant at which the dispute arose closed in January 1981; thus the only remedy at issue is back pay or other monetary relief, which will have no affect on any other former employee, white or black. There is no

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11/ The court of appeals affirmed the denial of class certification. App. 55a-57a.

question that Pullman Standard's attitude towards Pinkard changed markedly when he was chosen one of the few black union officials at the company's plant. Prior to that time Pinkard had an exemplary disciplinary record; thereafter his supervisors repeatedly objected to his efforts on behalf of his fellow workers.[12/] Following Pinkard's decision to assist the plaintiffs at the trial of the Swint case, company officials allegedly announced their intent to fire him.[13/] As the court of appeals' opinion persuasively demonstrates, the record compels the conclusion that Pinkard's dismissal was in retaliation for these activities.

Petitioner asserts that the decision of the court of appeals presents an issue

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12/ App. 76a-77a.

13/ App. 78a.

of "reverse discrimination",[14] arguing that the majority opinion declares that "the more militant an employee, the more misconduct it takes to fire him."[15] This contention is based on a somewhat fanciful reading of a single passage in that opinion, which states that "the trial court improperly focused on plaintiff's antagonism without counterbalancing the defendant's own antagonism." Petitioner itself expresses some uncertainty as to the significance of this statement.[16] Read in context the quoted language means simply that, in asssessing the motives of the defendant employer, primary attention must

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14/ App. 78a.

15/ Petition 18.

16/ Id.

be paid to evidence of company hostility to Pinkard's civil rights and union activities. The fact that Pinkard believed, correctly or otherwise, that Pullman Standard had engaged in racial discrimination neither justified his dismissal by the company nor provided a basis for rejecting his claim of discrimination.

Petitioner also urges that certiorari be granted to decide whether an employer can be held liable under 42 U.S.C. § 1981 for discharging a black employee in retaliation for his opposition to racial discrimination by that employer. Plaintiffs' Amended Complaint alleged a cause of action under section 1981 for such retaliation,[17/] and both courts below assumed that relation of that kind would be actionable under

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17/ See App. 6a; Amended Complaint, paragraph VIII(i).

section 1981. At no point prior to the filing of its Petition for Writ of Certiorari, however, did the company question this construction. Throughout the proceedings below the company's defense to Pinkard's section 1981 claim was largely factual. The only legal issue raised by petitioner in the court of appeals was an unexplained assertion that the existence of "jurisdiction" over the section 1981 claim was "doubtful".[18/] In its Answer petitioner claimed that no relief could be granted under section 1981 because Pinkard had not exhausted his union grievance procedures,[19/] an argument long ago abandoned. Whether

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18/ Brief for Appellee, No. 79-2890, p. 6.

19/ Answer to Amended Complaint, Ninth Defense.

section 1981 authorizes redress for discriminatory retaliation is not a jurisdictional issue. Thus petitioner's failure to raise that question during the first six years of this litigation precludes it from doing so for the first time in this Court.

Petitioner does not, moreover, dispute Pinkard's right to redress under Title VII for a discriminatory dismissal. The only reason that the court of appeals did not grant such relief under Title VII was that Judge Clark believed that Pinkard's Title VII action was premature because it was filed prior to the issuance of a right-to-sue letter by the EEOC. On Judge Clark's view Pinkard is free to file a fresh Title VII action once a new right-to-sue letter is issued. Thus even if this Court were to hold that an employer may,

consistent with section 1981, fire a black employee who objected to racial discrimination, that would not limit the relief to which Pinkard would ultimately be entitled.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Petitioner,
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REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-733

PULLMAN STANDARD, INCORPORATED
Petitioner,
v.
LOUIS PINKARD,
Respondent.

REPLY BRIEF FOR PETITIONER

Respondent's Brief (p. 1-2) understandably minimizes this case and characterizes the Court of Appeals' indulgence in fact finding as "a routine and proper application of Rule 52." The dissenting Judge, Lynne, says (Res. App. 87a-88a) it "is the product of the court's improper independent consideration of the totality of the circumstances found in the record . . .[,] precisely the historical practice of the former Fifth Circuit condemned by the Supreme Court in *Pullman-Standard* v. *Swint*, 456 U.S. ____ . . . (1982)"; that it "proceeds to resolve conflicts in the record evidence, to draw its own inferences and to make credibility choices. . . ." Even the majority of the Court of Appeals recognizes that such indulgence is contrary to the *Swint* decision but for the distinction it purports to make, *viz:* that *Swint's* strictures apply only to (Pet. App. 87a)—

> "(1) resolving in the first instance a factual dispute which had not been considered by the district court

> and (2) failing to remand where findings are infirm because of an erroneous view of the law and the record permits two or more resolutions of the factual issue."

Respondent does not address his brief to our arguments (Petition, 14-17) that this distinction is incorrect in point of both fact and law; but according to any rational approach there is nothing routine about this fact-finding process except in the sense that it was indeed the "historical practice of the former Fifth Circuit" condemned in *Swint* and will no doubt again become the routine way of dispensing justice in this Circuit, as it had become pre-*Swint*, unless the petition is granted and the decision reversed. Respondent argues (Brief, 5) that all members of the panel were well aware of *Swint* "which expressly rejected the proposition that appellate courts could engage in 'independent fact finding' as to 'ultimate facts.' " Buy why on earth did the majority even attempt to *distinguish Swint* except to justify its substituting its own finding of fact for the District Court's as to whether Mr. Pinkard was discharged for lawful advocacy of minority and union rights? Of course the panel was well aware of the *Swint* holding; the difference between the majority and the minority is that the former declared its strictures on independent fact finding limited to two narrow categories of cases, a point which is ignored by Respondent's Brief.

Further, Respondent seeks to belittle the case as unworthy of due process by saying (Brief 6) "only a single black employee will be effected" [sic]. As if to say, the former Fifth Circuit's historial practice should continue undiminished in one-on-one situations; and *Swint* should prevail only in bigger cases, perhaps class actions. What an egregious sugggestion! Mr. Pinkard's case began as a class action for a putative class of hundreds and wound up

at trial with four plaintiffs' presenting 12 claims for relief. If the idea is that the Court of Appeals should be permitted to rule contrary to this Court so long as it does so in only one claim out of 12, surely such an arbitrary principle would be contrary to the constitutional integrity of this Court. Respondent's Brief (p.7) ignores the rationale of the majority below including both its finding that Pinkard was guilty of misconduct meriting some discipline (Pet. App. 79a, 86a); and the process of balancing his militance against his misconduct in weighing the appropriateness of the degree of discipline imposed. It urges yet another factual scenario (omitting any consideration of misconduct), saying (Brief, 7):

> ". . . Pullman Standard's attitude towards Pinkard changed markedly when he was chosen one of the few[1] black union officials at the company's plant. Prior to that time Pinkard had an exemplary disciplinary record;[2] thereafter his supervisor repeatedly objected to his efforts on behalf of his fellow work-

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[1] *Sic;* it is undisputed that ever since 1941 approximately one-half the Steelworkers Union officers and over half the stewards have been black. There have been literally hundreds of them. *Swint* v. *Pullman-Standard,* 17 FEP Cases 730, 735, 738 (N.D.Ala., 1978):

"It is not without significance that blacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeemen and negotiators. . . .

". . . In 1954, as was true in 1941 and the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formation of the policies and positions of the union—the local not being dominated by whites."

These findings have been undisturbed and unquestioned in the subsequent proceedings in that case.

[2] Another way of stating this is that he seldom or never committed any disciplinary infractions until then.

> ers.[3] . . . [T]he record compels the conclusion that Pinkard's dismissal was in retaliation for these activities."

On the contrary, the record shows without question that Mr. Pinkard's misconduct, including the wildcat strike, constantly going outside the grievance procedure, his calling foreman Dave Mason without justification a liar, and his insubordinate refusal to report to a disciplinary interview, coincided in time with the period after he became a union steward; and so the time factor is wholly consistent and equally referrable to the company's articulation of why it fired him. As pointed out in our Petition (p. 12-13) there was direct testimony of the reason for his discharge and such testimony cannot be arbitrarily disregarded as the majority below and Respondent would have it disregarded. It is a pure question of credibility whether the direct evidence has been overcome by the circumstantial argument of Mr. Pinkard; and certainly nothing compelled the District Court or the Arbitrator either to a conclusion or credibility finding opposite to the one they reached. Respondent's brief simply misstates the facts in the record, omits others, and says they compelled a finding in Pinkard's favor. In other words, it argues that no reasonable person could conclude on this record that Pinkard was fired for the reasons the direct testimony said he was, although Arbitrator Whyte, District Judge Guin, and dissenting Judge Lynne did all so conclude; therefore, Respondent necessarily argues that none of them is a reasonable man.

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[3] True, but only in those frequent instances where his efforts involved engaging in a wildcat strike (Pet. App. 41a), bypassing the contractual grievance procedure (Pet. App. 19a, 48a-49a), or other unprotected activities. There was no competent evidence that any objection was ever made to his protected or privileged advocacy activities.

Respondent's Brief (p.5) says we "point to no passage in the opinion below announcing or utilizing" a "standard . . . permitting appellate courts to engage in 'independent fact finding.' " We believe both Judge Lynne's dissent (Pet. App. 87a-88a) and our Petition, *passim*, certainly does this, but any omission in that regard is supplied by Respondent's own observation (p.7) that:

> "*As the Court of appeals' opinion persuasively demonstrates*, the record compels the conclusion *that Pinkard's dismissal was in retaliation* for these activities." [Emphasis supplied.]

I.e., the District Court found as a fact it was not retaliatory, but the Court of Appeals majority found as a fact that it was; the "passage in the opinion below" utilizing the independent fact finding standard is precisely that to which Respondent here refers. Instead of affirming or remanding for fact finding, the majority assumed that function independently of the District Court. So it is bizarre to say petitioner has insufficiently pointed out the exact passage wherein the Court of Appeals majority indulged in independent fact-finding when Respondent's brief itself points out that is what the majority below did, as a matter of actual fact.

Respondent's brief neither defends nor even mentions the majority's attempted distinction of *Swint*. It does not offer its own distinction of *Swint* either. Perhaps it argues it is enough that the Court of Appeals obey Rule 52 in form, that is by reciting the formula that the record leaves them with a firm conviction that a mistake has been made and so a finding is clearly erroneous, without abiding by its substance, that is by actually leaving genuine disputes of credibility and fact up to the trier of fact to resolve. If that is Respondent's contention, it is contrary to this Court's post-*Swint* decision in *White-*

Wilson Medical Clinic v. *Robbins*, ____ U.S. ____, 102 S.Ct. 2229, 72 L.Ed 2d 842 (1982), where the same Circuit followed the ritual but not the substance of Rule 52 in an indistinguishable context, and this Court reversed.

Decisions of this Court never affect just one person. If left unreviewed, the result of the decision below will undoubtedly be general resumption of the historical practice condemned in *Swint* with at best on occasional ritualistic formula to justify substituting appellate findings of fact for the trial court's on genuinely disputed questions of fact as was done in this case. Incalculable damage would be done to the administration of justice if that historical practice is resumed. Every losing party in a factual case, having a de novo shot at the facts, would be foolish not to appeal, particularly if he thought there were any propensity of the appellate judges to favor his type of case. Not only would this burden the judicial system, it makes it a farce for judges who have heard lawyers' argument for 30 minutes to assume an understanding of the facts and credibility of witnesses superior to that of judges who have heard live witnesses for days. It certainly will foster the public impression that this is not truly a government of laws, but of men. Belief in the fundamental fairness of the judicial system is an essential condition to the preservation of liberty. The case is an important one deserving review by this Court because the historical practice of the Eleventh and former Fifth Circuits, which was here resumed despite *Swint*, will continue to affect the lives and fortunes of millions, investment decisions and prosperity of an entire region.

As for Respondent's suggestion that the question of whether an action for retaliation lies under § 1981 (Brief p. 10-11) was not sufficiently raised in the Court of Appeals, it should be noted that (1) a question of jurisdic-

tion over the subject matter which this certainly was may be raised at any time and cannot be waived in a federal court; (2) petitioner did raise the jurisdictional question both in its answer and its brief on appeal, as conceded in Respondent's brief, p. 10; and (3) petitioner raised it once again in its petition for rehearing in the Court of Appeals, and called express attention in connection with this jurisdictional question to *General Contractors Ass'n.* v. *Pennsylvania*, ____ U.S. ____, 102 S.Ct. 141, 73 L.3d.2d 835 (June 29, 1982), which was decided in the interval between the decision below (June 10, 1982) and the petition for rehearing, which was denied without opinion on August 31, 1982. Certainly the question was adequately raised, and in no aspect has ever been abandoned.[4]

The impossibility of reconciling the decision below with the *Swint* case is perfectly evident on the face of the petition, the appendix thereto, and Respondent's Brief in Opposition (which clearly admits the majority below substituted its finding of ultimate fact for the District

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[4] Compare Respondent's Brief, p. 10, "an argument long ago abandoned" with Petition p. 25, 26, n. 16. The arbitration award was made on October 15, 1976 (Pet. App. 37a), many months after the answer was filed; consequently the form of the argument, but not its substance, has changed slightly.

Court's, saying this was "compelled"); therefore, it would certainly not be inappropriate if this Court dispensed with briefs and oral argument, granted the writ and reversed summarily much as it did in *White-Wilson Medical Clinic* v. *Robbins*, ___ U.S. ___, 102 S.Ct. 2229, 72 L.Ed.2d 842 (1982).

Respectfully submitted,

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